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A TREATISE
ON THE
LAW AND PRACTICE
AS TO
RECEIVERS
APPOINTED BY THE
COURT OF CHANCERY.

BY
WILLIAM WILLIAMSON KERR,
OF LINCOLN'S INN, BARRISTER-AT-LAW.

WITH NOTES AND REFERENCES TO AMERICAN AUTHORITIES

BY
GEO. TUCKER BISPHAM.

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P R E F A C E

TO THE

SECOND AMERICAN EDITION.

THE present is the second American edition of this work. It contains references to the American and English authorities down to the present time, and embraces some decisions which had been omitted from the first edition. Many of the notes have been enlarged, and some entirely rewritten. An Appendix of Forms has been added, which has been drawn principally from Seton on Decrees, but which has been made up somewhat from cases in actual practice in this country. The index has been enlarged, and the references carefully verified.

G. T. B.

MARCH, 1877.

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A TREATISE
ON THE LAW AND PRACTICE
AS TO
RECEIVERS
APPOINTED BY
THE COURT OF CHANCERY.

CHAPTER I.

PRINCIPLES ON WHICH A RECEIVER IS APPOINTED BY THE
COURT OF CHANCERY.

Jurisdiction.—The jurisdiction of the Court of Chancery to appoint a receiver has been assumed for the advancement of justice, and is founded on the inadequacy of the remedy to be obtained in the courts of ordinary jurisdiction.*(a)* There are few cases that can be stated in which the court has not jurisdiction where it is essential to the justice of the case to interfere by appointing a receiver.*(b)* If the remedy afforded by the courts of ordinary jurisdiction is inadequate for the purposes of justice, the Court of Chancery will, on

(a) See 3 Akt. 564, 2 Sw. 165, *(b)* See *Bainbrigge v. Badde-*
Mitf. Pl. 145; *Stitwell v. Wil-* *ley*, 3 Mac. & G. 419.
liams, 6 Madd. 49.

a proper case being made out, *ex debito justitiæ*, appoint a receiver.(c)¹

Nature of the Office.—A receiver is an indifferent person between the parties, appointed by the court to collect and receive the rents, issues, and profits of land, or the produce of personal estate, or other things in question pending the suit, which it does not seem reasonable to the court that either party should do; or where a party is incompetent to do so, as in the case of an infant.(d)² A receiver can only be properly granted for the purpose of getting in and securing funds which this court at the hearing, or in the course of the cause, will have the means of distributing among the persons entitled to those funds.(e)³

(c) See *Cupit v. Jackson*, 13 Pri. 734; see also L. R. 6 Eq. 447, *per Giffard*, L. J.

(d) Dan. Ch. Pr. 1552.

(e) *Evans v. Coventry*, 3 Drew. 80; see *Wright v. Vernon*, 1b 121.

¹ See the remarks of Chancellor Bland in *Williamson v. Wilson*, 1 Bland, 420, 421. See also, *Skinner v. Maxwell*, 66 N. C. 45.

² A receiver is not in any particular more bound to the party upon whose motion he is appointed, than to any other party in the cause; he owes an equal duty to all alike, and he is responsible to the court alone. *Booth v. Clark*, 17 Howard, 331; *Ex parte Jay*, L. R. 9 Ch. 133; *Lottimer v. Lord*, 4 E. D. Smith, 183; *Libby v. Rosekrans*, 55 Barb. 202; *Baker v. Backus*, 32 Ill. 79; *Beverley v. Brooke*, 4 Grattan, 208. The general principles regulating the appointment of a receiver, and the nature of his office, are well stated in this last case by Baldwin, J.

³ But a receiver is sometimes appointed to take charge of property in which a stranger to the cause may have an interest. *Vincent v. Parker*, 7 Paige, C. R. 65. In such a case the court is careful to make such orders, from time to time, as will protect the rights of the third party; *Id.*; and see *Howell v. Ripley*, 10 Paige, C. R. 43; and *In re Joyce*, L. R. 10 Ch. 222. But in *Levi v. Karrick*, 13

The object sought by the appointment of a receiver may be generally described to be to provide for the safety of property, pending the litigation which is to decide the right of litigant parties,^(f) or during the minority of infants,^(g) or to preserve property in danger of being dissipated or destroyed by those to whom it is by law entrusted, or by persons having immediate but partial interests therein.^(h)¹

Appointment a Matter of Discretion.—The appointment of a receiver is a matter resting in the sound discretion of the court.⁽ⁱ⁾² In exercising its discretion, the court

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| (f) <i>Tullett v. Armstrong</i> , 1 | (h) Mitf. Pl. 133. |
| Keen, 428; <i>Owen v. Homan</i> , 4 | (i) <i>Skip v. Harwood</i> , 3 Atk. |
| H. L. 1032. | 564; <i>Greville v. Fleming</i> , 2 J. |
| (g) Dan. Ch. Pr. 1552. | & L. 339. |

Withrow, 344, it is said that when the rights of *bonâ fide* purchasers have intervened, the court will not appoint a receiver. And a receiver will not be appointed at the suit of a mortgagee, over property which is in possession of one who claims to hold free of the mortgage and who is not a party to the suit; *N. Y. Life Ins. Co. v. Glass et al.*, 50 How. 88.

¹ "Receivership," say the court in *Meyers v. Estell*, 48 Miss. 401, "is one of those remedial agencies devised originally in order to preserve the fund or thing from removal beyond the jurisdiction or from spoliation, waste, or deterioration, pending the litigation. This was the original purpose; a preservation of the thing so that it might be appropriated as the final decree shall appoint." The custody of receivers "is that of the law, and is in its nature provisional and suspensive, leaving the rights of the parties concerned to be controlled by the ultimate judgment of the Court." Per Johnson, J., Court of Appeals, N. Y., in *Miller v. Bowles*, 10 Nat. Bank. R. 515.

² *Copper Hill Mining Co. v. Spencer*, 25 Cal. 13; *Oakley v. Patterson Bank*, 1 Green, C. R. 181; *Sloan v. Moore*, 37 Penna. St. R. 217; *The Orphan Asylum v. McCartee*, Hopkins, 429. But

proceeds with caution, and is governed by a view of the whole circumstances of the case. No positive or unvarying rule can be laid down as to whether the court will or will not interfere by this kind of *interim*

this discretion does not exist in all cases; see *Milwaukee Railroad Co. v. Souther*, 2 Wallace, 521. In this case a receiver had been appointed, by the Circuit Court, on application of a mortgage creditor of a railroad, who had filed a foreclosure bill. The amount due for interest on the mortgage was afterwards ascertained when the case went up to the Supreme Court on appeal. After the case had gone back to the Circuit Court, a junior mortgagee moved to discharge the receiver, offering, at the same time, to pay the interest which had been ascertained to be due. The court refused the application, but this decision was reversed on appeal.

"The only doubt," said Miller, J., "which the court could have on the question, arises from the principle that the appointment and discharge of a receiver are ordinarily matters of discretion in the Circuit Court, with which this court will not interfere. As a general rule, this proposition is not denied. But we do not think it applicable to the case before us. While the parties to this suit were fiercely litigating the amount of the mortgage debt, and questions of fraud in the origin of that debt, the appointment or the discharge of a receiver for the mortgaged property very properly belonged to the discretion of the court in which the litigation was pending. But when those questions had been passed upon by the Circuit Court and by this court on appeal, and the amount of the debt definitely fixed by this court, the right of the defendant to pay that sum, and have a restoration of his property by discharge of the receiver, is clear, and does not depend on the discretion of the Circuit Court. It is a right which the party can claim; and if he shows himself entitled to it on the facts on the record, there is no discretion in the court to withhold it. A refusal is error—judicial error—which this court is bound to correct when the matter, as in this instance, is fairly before it." See also *Jones v. Holliday*, 37 Georgia, 573; *Reid v. Reid*, 38 Id. 29; *Crawford v. Ross*, 39 Id. 44; *Ware v. Ware*, 42 Id. 408; *Jenkins v. Jenkins*, 1 Paige, C. R. 243; *Ex parte Walker*, 25 Alab. 81. In some cases the propriety of appointing a receiver cannot be determined until the hearing—see *Verplank v. Caines*, 1 Johns. C. R. 57, where a demurrer to a bill praying for a receiver was overruled.

protection of the property. Where, indeed, the property is as it were *in medio*, in the enjoyment of no one, the court can hardly do wrong in taking possession. It is the common interest of all parties that the court should prevent a scramble. Such is the case where the receiver of property of a deceased person is appointed pending a litigation as to the right of probate or administration. No one is in the actual enjoyment of property so circumstanced, and no wrong can be done to any one by taking and preserving it for the benefit of the successful litigant. But where the object of the plaintiff is to assert a right to property of which the defendant is in enjoyment, the case is necessarily involved in farther questions. The court by taking possession at the instance of the plaintiff may be doing a wrong to the defendant; in some cases an irreparable wrong. If the plaintiff should eventually fail in establishing his right against the defendant, the court may by its *interim* interference have caused mischief to the defendant, for which the subsequent restoration of the property may afford no adequate compensation.¹ In all cases, therefore, where the court interferes by appointing a receiver of property in the possession of the defendant, before the title of the plaintiff is established by decree, it exercises a discretion to be governed by all the circumstances of the case. Where the evidence on which the court is to act is very clear in favor of the plaintiff, there the risk of eventual injury to the defendant is very small, and

¹ See *Schlecht's Appeal*, 60 Penna. St. R. 176, and Chap. II. Sect. 14, *infra*.

the court does not hesitate to interfere. Where there is more of doubt, there is of course more of difficulty. The question is one of degree, as to which, therefore, it is impossible to lay down any precise or unvarying rule.^(k)¹

Principles which Govern the Discretion of the Court.—
The duty of the court upon a motion for a receiver is

(k) *Owen v. Homan*, 4 H. L. 1032, *per* Lord Cranworth; see *Gray v. Chaplin*, 2 Russ. 145.

¹ Where one party has a clear right to the possession of property and where the dispute is as to the title only, the court would very reluctantly disturb that possession. But when the property is exposed to danger and to loss, and the party in possession has not a clear legal right to the possession, it is the duty of the court to interfere and have it secured by appointing a receiver. *Lenox v. Notrebe*, 1 Hempstead, 225. See also *Hamberlain v. Marble*, 24 Miss. 586. Such an appointment is a strong measure, and is not to be exercised doubtingly. *Chicago Co. v. U. S. Pet. Co.*, 57 Penna. St. R. 83; *Langolf Seiberlitch*, 2 Pars. Eq. Cas. 79, 80; *Blondheim v. Moore*, 11 Maryl. 365-374, 376; *Voshell v. Hynson*, 26 Marly. 83; *Pullan v. Cincinnati & Chicago R. R. Co.*, 4 Biss. 47; *Williamson v. New Albany, &c., R. R.*, 1 Id. 198; *Beecher v. Bininger*, 7 Blatch. 170; *Whilpley v. The Erie R. R. Co.*, 6 Id. 271; *McVicker v. Ross*, 55 Barbour, 248. "All the circumstances of the case are to be taken into consideration, and if the case be such that a greater injury would come from the appointment of a receiver than from leaving the property in the hands now holding it, or if any other considerations of propriety or conveniency render the appointment of a receiver improper or inexpedient, none will be appointed. In this case the trustees having possession of the trust fund and property are public officers of the State and trustees *ex officio*. . . . The State has a great interest in the trust. . . . These public and political objects of the trust make it extremely fitting that the chief executive officers of the State should administer the fund. And it must be a very strong case indeed which will induce the Court to take the property out of their hands and put it into the hands of its own officers. . . . The motion for a receiver is therefore denied." *Per* Bradley, J., in *Vose v. Reed*, 1 Woods, 647, 650, 651, 652.

merely to protect the property in the mean time for the benefit of those persons to whom the court at the hearing of the cause, when it will have before it all the evidence and materials necessary for a determination, shall think it properly belongs.(l) On motion for a receiver, the court will not prejudice the cause.(m) The court does not in appointing a receiver say what view it shall take at the hearing.(n) On motion for a receiver, the court has not to consider the question of what may be the result at the hearing, nor whether the time may not come when, on a different state of things, the court would appoint a receiver.(o) In dealing with the application, the court is bound not to go out of its way in order to give the plaintiff an opportunity of obtaining previously to the hearing the opinion of the court upon the subject-matter of the suit.¹ The court is bound to express its opinion only so far as it is necessary to show the grounds on which the interlocutory motion is disposed of. It is the duty of the court to confine itself strictly to the point upon which it is called upon to decide, and not to go into the merits of the case.(p) The court will give no

(l) *Blakeney v. Dufaur*, 15 Beav. 42.

(m) *Huguenin v. Baseley*, 13 Ves. 107.

(n) *Fripp v. Chard Railway Co.*, 11 Ha. 264.

(o) *Gray v. Chaplin*, 2 Russ. 141.

(p) *Skinnners' Society v. Irish Society*, 1 M. & C. 164; see

Evans v. Coventry, 5 D. M. & G. 918; *Blakeney v. Dufaur*, 15 Beav. 42.

¹ The appointment of a receiver determines nothing as to the title to the subject-matter of the cause. *In the matter of Rachel Colvin*, 3 Maryl. Ch. Decis. 278-302; *Chase's Case*, 1 Bland, 206-213; *Beverley v. Brooke*, 4 Grattan, 208.

encouragement to any attempt to obtain its decision on important questions before the hearing.(q) The court will not, indeed, appoint a receiver at the instance of a person whose right is disputed, where the effect of the order would be to establish the right, even if the court be satisfied that the person against whom the demand is made is fencing off the claim.(r)

In determining whether it shall appoint a receiver, the court deals with the case as it appears upon the pleadings and evidence, and stands on the record.(s) If the court is satisfied upon the materials it has before it that the relief prayed by the bill will be given when a decree is pronounced, and that it is necessary or expedient to secure the property until the hearing, there is a case for the appointment of a receiver.(t) If it appears to the court that the plaintiff has established a good *prima facie* equitable title, and that the property, the subject-matter of the suit, is in danger if left in the possession of the party against whom the receiver is prayed until the hearing,(u) or, at least, that there is reason to apprehend that the plaintiff will be in a worse situation if the appointment of a

(q) *Bates v. Brothers*, 2 Eq. 327.

(r) *Greville v. Fleming*, 2 J. & L. 335.

(s) *Silver v. Bishop of Norwich*, 3 Sw. 116 n.; *Skinnors' Society v. Irish Society*, 1 M. & C. 164; *Evans v. Coventry*, 5 D. M. & G. 918.

(t) *Huguenin v. Baseley*, 13 Ves. 107; *Davis v. Duke of Marlborough*, 2 Sw. 138; *Clegg v. Fishwick*, 1 Mac. & G. 299;

Witworth v. Whyddon, 2 Mac. & G. 55; *Owen v. Homan*, 3 Mac. & G. 412, 4 H. L. 1033.

(u) *Evans v. Coventry*, 5 D. M. & G. 918.

receiver be delayed,(x) the appointment of a receiver is almost a matter of course.(y)¹ If there is no danger to the property, and no fact is in evidence to show the necessity or expediency of appointing a receiver, a receiver will not be appointed, unless there be some other equity in the case to support the application.(z)² The mere allegation of danger to the property is not sufficient, if the court is satisfied that no loss need be apprehended.(a) If, however, it be the true and necessary result of the pleadings as they stand, that the

(x) *Aberdeen v. Chitty*, 3 Y. 2 Mac. & G. 55; *Wright v. Vernon*, 3 Drew. 121; *Micklethwaite v. Micklethwaite*, 1 D. & J. 530; *Bowker v. Henry*, 6 L. T. N. S. Beav. 29; see *Metcalf v. Pulvertoft*, 1 V. & B. 180.

(y) See *Middleton v. Dodswell*, 43. 13 Ves. 266; *Oldfield v. Cobbett*, 4 L. J. Ch. N. S. 272. (a) *Witworth v. Whyddon*, 2 Mac. & G. 55.

(z) *Whitworth v. Whyddon*,

¹ In Iowa it is expressly provided by statute that where a party to civil action shows a *probable right* to the subject matter of the litigation, and that the property would be jeopardized by remaining in the custody of the adverse party, a receiver shall be appointed. Revised Laws of Iowa, 622 (Section 1656 of the Code). And see *Saylor v. Mockbie*, 9 Iowa, 209. So, too, by the California Code; "where a *prima facie* right is established, and the property is in danger," a receiver may be appointed. Wood's Digest, 185.

² *Baker v. Backus*, 32 Ill. 79-95. The fact that the fund is in danger is not of itself sufficient; the party in possession of the property must be irresponsible. *Willis v. Corlies*, 2 Edwards, C. R. 281, 286-7; *Tyler v. Poppe*, 4 Id. 430; *Langolf v. Seiberlitch*, 2 Pars. Eq. Cas. 79-80; *Clark v. Ridgely*, 1 Maryl. Ch. Dec. 70; *Blondheim v. Moore*, 11 Maryl. 365-374; *Wooding v. Malone*, 30 Georgia, 979; see also *Burt v. Burt*, 41 New York, 46; *Haggarty v. Pittman*, 1 Paige, C. R. 298; *Cofer v. Echerson*, 6 Iowa, 502; and *Edie v. Applegate*, 14 Iowa, 273.

property is in danger or that loss may be apprehended, there is a case for a receiver.^(b)¹

It is not, however, necessary, to entitle a party to the appointment of a receiver, that the property in question should appear to be in danger unless the appointment be made. It is enough that a good equitable title be made to appear, and that the remedy at law should not fulfil the requisition of justice.^(c) A

(b) *Evans v. Coventry*, 5 D. Pri. 734; *White v. Smale*, 22 M. & G. 917; see *Metcalfe v. Pul-* Beav. 73; *White v. James*, 26 *vertoft*, 1 V. & B. 180. Beav. 191; *Hall v. Burt*, 2 J. & (c) See *Cupit v. Jackson*, 13 H. 76; *supra*, p. 1.

¹ In *Blondheim v. Moore*, 11 Maryland, 364 (a leading case), it was said that the authorities upon the subject established the following propositions:—

1st. The power of appointment is a delicate one, and to be exercised with great circumspection.

2d. It must appear that the claimant has a title to the property, and the court must be satisfied by affidavit that a receiver is necessary to preserve the property.

3d. There is no case where the court appoints a receiver merely because the measure can do no harm.

4th. Fraud or imminent danger, if the intermediate possession should not be taken by the court, must be clearly proved.

5th. Unless the necessity be of the most stringent character, the court will not appoint until the defendant is first heard in response to the application.

These rules were approved and followed in *Voshell v. Hynson*, 26 Maryland, 83. See also *The State v. The Northern Central R. R. Co.*, 18 Id. 193; *Haight v. Burr*, 19 Id. 134; *Furlong v. Edwards*, 3 Id. 99; *Thompson v. Diffenderfer*, 1 Maryl. Ch. Decis. 489; *Tomlinson v. Ward*, 2 Connecticut, 391; *The Orphan Asylum v. McCartee*, Hopkins, 429; *Mays v. Rose*, 1 Freeman (Chan.), 703; *Vance v. Woods*, 46 Miss. 120; *Coddington v. Tappan*, 11 C. E. Green, 141; *Ladd v. Harvey*, 1 Foster, 514; *Maynard v. Raily*, 2 Nevada, 313; *Jones v. Dougherty*, 10 Georgia, 281; *Crawford v. Ross*, 39 Georgia, 44; *Crane v. McCoy*, 1 Bond, 422.

receiver, accordingly, may, on a proper case being made out, be appointed to raise the arrears of an annuity,^(d) or a rent-charge;^(e) so, also, an equitable mortgagee may have a receiver appointed if the payment of interest on his security be in arrear;^(f) so, also, if a person takes the conveyance of a legal estate, subject to equitable interests, he must satisfy these equitable interests, or submit to the appointment of a receiver.^(g)

Conduct of the Party who makes the Application looked to.—The court, on the application for a receiver, always looks to the conduct of the party who makes the application, and will refuse to interfere unless his conduct has been free from blame.^(h) Parties who have acquiesced in property being enjoyed against their own alleged rights cannot come to the court for a receiver.⁽ⁱ⁾¹

Pleading, Parties, &c.—The record should be in such a state as will enable the judge to determine who is to take out of court the fund which the appointment of the receiver shall have brought into court.^(k) But if

(d) See *Cupit v. Jackson*, 13 L. J. Ch. 169. Comp. *Wood v. Pri.* 734. [*Sollory v. Leaver*, L. R. 9 Eq. 22.]

(e) *White v. Smale*, 22 Beav. 144; *Gray v. Chaplin*, 2 Russ. 147; *Skinnners' Society v. Irish Society*, 1 M. & C. 162.

(f) *Infra*, Chap. II. Sect. 4. (g) *Pritchard v. Fleetwood*, 1 Mer. 54. (k) *Gray v. Chaplin*, 2 Russ. 147.

(h) See *Baxter v. West*, 28

¹ *Tibbals v. Sargeant*, 1 McCart. 449.

the court sees that there is a case upon the record for the appointment of a receiver, it is no sufficient answer that the record is not perfect as to particulars, and is not in the shape in which the court may find it necessary that it should be placed in order to administer complete justice. If the objection is a formal one, and such as may be removed by amendment, it will not stay its hand on account of any such objections. Objections to the bill on the ground of misjoinder, multifariousness, or want of parties, are no answer on the application for a receiver, if a case for the appointment of a receiver be shown.(l)

If the subject of the suit in respect of which a receiver is sought is a matter of public interest, the Attorney-General should be made a party.(m)

When the original bill had been answered, it was held that the pendency of a plea to the amended bill did not prevent a motion for a receiver.(n)

If certain statements in the bill and affidavits are relevant to the relief asked, the court will not on motion allow exceptions to be taken to them.(o) Where, for instance, on bill for a receiver alleging that the executor was of bad character and drunken habits, the court would not, on the motion for a receiver, allow exceptions for scandal and impertinence.(p)

(l) *Evans v. Coventry*, 5 D. M. & G. 918; *Steele v. Cobham*, L. R. 1 Ch. App. 325; see *Major v. Major*, 8 Jur. 799.

(n) *Thompson v. Selby*, 12 Sim.

(o) *Everett v. Prythergh*, 12 Sim. 365.

(m) *Gray v. Chaplin*, 2 Russ. 147; *Skinner's Society v. Irish Society*, 1 M. & C. 162.

(p) *Ibid.*

If a receiver is asked for generally, the court may grant the prayer as far as is proper, or in a limited form.(q)

Receiver Appointed pending Litigation in a foreign Court.—The court has jurisdiction to appoint a receiver pending litigation in a foreign court.(r)¹

Order for Receiver operates as an Injunction.—The appointment of a receiver operates as an injunction. An order for an injunction is always more or less included in an order for a receiver.² It is not necessary, if a receiver be appointed, to go on and grant an injunction in terms; but in cases where persons in a fiduciary character have misconducted themselves, the court will often grant an injunction as well as a receiver, not because an injunction is necessary to prevent a party from receiving, when a receiver is once appointed, but for the purpose of marking its sense of the conduct of the parties who have misconducted themselves.(s)

(q) *Major v. Major*, 8 Jur. 799. (s) *Evans v. Coventry*, 3 Drew. 82.

(r) *Transatlantic Co. v. Pictioni*, John. 607.

¹ The court will not appoint a receiver over property which is already in the custody of a proper tribunal. See *Alabama & Chattanooga R. R. Co. v. Jones*, 7 Nat. Bank. R. 145-169; *Blake v. The Alabama & Chattanooga R. R. Co.*, 7 Id. 331-335; *The Milwaukee & St. Paul's R. R. Co. v. The Milwaukee & Minnesota R. R. Co.*, 20 Wisconsin, 165.

² See, however, *Boyd v. Murray*, 3 Johns. C. R. 48.

Receiver not Appointed if Defendant submits to a certain Order.—The court may abstain from appointing a receiver on the submission of the defendant to submit to a certain order,^(t) to pay the moneys into court,^(u) or to deal with the moneys as the court shall direct.^(x)

What the Order for a Receiver Directs.—The order appointing a receiver should state distinctly on the face of it over what property the receiver is appointed,^(y) or else refer to the pleadings or some document in the cause which describes the property.^(z) It usually directs the receiver to pass his accounts from time to time, and to pay the balances found due from him into court to the credit of the cause, to be there invested and accumulated, or otherwise, as may be directed.^(a)

If the appointment of a receiver is over real or leasehold estate, the order usually directs the parties to the record who are in possession, not as tenants but as owners, to deliver up to him the possession.^(b)

If tenants are in possession of real or leasehold estates over which a receiver is appointed, the order should direct them to attorn, and pay their rents in

(t) *Pritchard v. Fleetwood*, 1 Mer. 54.

(u) *Prebble v. Boghurst*, 1 Sw. 313; *Curling v. Lord Townshend*, 19 Ves. 633; *Pulmer v. Vaughan*, 3 Sw. 173.

(x) *Talbott v. Hope Scott*, 4 K. & J. 141.

(y) *Crow v. Wood*, 13 Beav. 271.

(z) Set. on Decr. 1005.

(a) Set. on Decr. 1002; Dan. Ch. Pr. 1573.

(b) *Griffith v. Griffith*, 2 Ves. 401; *Everett v. Belding*, 22 L. J. Ch. 75, 1 W. R. 44; see as to form of order, *Davis v. Duke of Marlborough*, 2 Sw. 108, 116; *Baylies v. Baylies*, 1 Coll. 548; Set. on Decr. 1023.

arrear and the growing rents to the receiver,^(c) but this direction should be omitted when the estates are out of England.^(d)

If the property over which a receiver is appointed is outstanding personal estate, the order should direct the parties in possession of such estate to deliver over to the receiver all such estate, and also all securities in their hands for such estate or property, together with all books and papers relating thereto.^(e)¹

Costs of Motion.—The court may, at its discretion, deal with the costs of the motion for a receiver at the time of the application,^(f) or the costs of the application may be ordered to be costs in the cause.^(g)

The costs of the motion for a receiver are sometimes reserved until the hearing,^(h) even although the application is refused.⁽ⁱ⁾

(c) Set. on Decr. 1002, 1012 4 Jur. 858; *Skinnners' Society v. et seq.*; see, as to form of order, *Irish Society*, 1 M. & C. 169; *Fall v. Elkins*, 9 W. R. 861.

(d) Ib. 1007, 1039.

(g) *Topping v. Searson*, 6 L. T.

(e) Set. on Decr. 1002, 1030, 1031. If necessary, a receiver will be ordered to keep separate accounts of real and personal estates. *Hill v. Hobbitt*, 18 L. T. N. S. 553.

N. S. 450; *Fall v. Elkins*, 9 W. R. 861; *Bowker v. Henry*, 6 L. T. N. S. 43; see Morg. & Dav. on Costs, 31, 32.

(h) *Chaplin v. Young*, 6 L. T. N. S. 97.

(f) *Goodman v. Whitcomb*, 1 J. & W. 593; *Wilson v. Wilson*, 2 Keen, 249; *Wood v. Hitchings*,

(i) *Baxter v. West*, 28 L. J. Ch. 169; *Coope v. Creswell*, 21 W. R. 299.

¹ For forms of orders appointing receivers, see Appendix.

CHAPTER II.

IN WHAT CASES A RECEIVER WILL BE APPOINTED.

SECTION I.—IN THE CASE OF INFANTS.

THE court will, upon a proper case being made out, protect the estate of an infant by appointing a receiver.^(a)¹ Where infants are concerned, the court considers chiefly what would be most beneficial to their interests.^(b) The court will protect the estate of an infant, even against his father.^(c) If an infant has or becomes possessed of an estate, a receiver will be appointed if it appear that his father is insolvent or

(a) *Butler v. Freeman*, Amb. 1 N. R. 389; see *Whitelaw v. Sandys*, 12 Ir. Eq. 393.

(b) *Ramsden v. Fairthorpe*, (c) *Butler v. Freeman*, Amb. 303.

¹ In *Rice v. Tonnele*, 4 Sandf. C. R. 568, the validity of a will was being contested, and an active litigation thereon was pending. An infant to whom an annuity had been bequeathed by the testator, and who, in the event of the will being set aside, was entitled, as heir, to one-fourth of the estate, filed a bill praying that maintenance might be furnished to her out of the estate, and asking that a receiver should be appointed to that end. It also appeared that, owing to her pecuniary condition, maintenance was necessary. It was held that the bill was properly filed, and that maintenance ought to be allowed to the infant, to an amount not exceeding the annuity; and that, if necessary to carry out the decree, a receiver ought to be appointed.

of bad character, or that there is danger of the rents being lost.(d) In a case where the mother of infants was dead, and the father was a man of irregular habits who had married his servant, the minors being entitled to real estate in right of their mother, a receiver was appointed.(e)

If there be no testamentary guardian appointed by the testator,(f) or if the testamentary guardian appointed by the will declines to act,(g) a receiver will be appointed on a proper case being made out. The appointment, however, of a testamentary guardian of an infant by his father does not, under stat. 12 Car. 2, c. 24, constitute any objection to the appointment of a receiver of the estate of the infant. The exercise by the father of an infant of the power given by the act to appoint a testamentary guardian, to whom the statute gives the custody of the profits of the infant's lands, and the management of his personal estate, does not affect the right of the court to appoint a receiver, the guardian having no estate, and the extent of his powers being uncertain.(h) Guardians appointed by will under the statute, have no more power than guardians in socage, and are but trustees. If it be made to appear that the estate of an infant is likely to suffer by the conduct of his guardian, the court will interpose and appoint a receiver, upon the same

(d) *Kiffin v. Kiffin*, cited 1 P. W. 704; *Ex parte Mountfort*, 15 Ves. 449 n.

(f) *Hicks v. Hicks*, 3 Atk. 273.

(e) *Re Cormicks*, 2 Ir. Eq. 111.

(g) *Bridges v. Hales*, Mose.

264.

(h) *Gardner v. Blane*, 1 Ha. 381.

principles upon which it interposes in the case of trustees and executors.⁽ⁱ⁾ In a case, accordingly, where the mother of infant children, who had been appointed by her husband executrix and guardian of the children, married a man in necessitous circumstances, a receiver was appointed.^(k)

SECTION II.—IN THE CASE OF EXECUTORS AND TRUSTEES.

Receiver not Appointed on Slight Grounds.—The court will, upon a proper case being made out, dispossess an executor or trustee of the trust estate by appointing a receiver, but it will not do so upon slight grounds.¹ It is for the testator or creator of the trust, and not for the court, to say in whom the trust for the administration of the property shall be reposed. Though a suit be instituted by a party having an interest in the estate, it does not follow that the trust created by the testator or settlor is to be set aside.^(l) A strong case must be made out to induce the court to dispossess a trustee or executor who is willing to act.^(m)² If there

(i) *Duke of Beaufort v. Bertie*, 1 P. W. 704; *infra*, p. 20; see, as to order for receiver and injunction, *Brooke v. Cooke*, Set. on Decr. 919.

(l) *Middleton v. Dodswell*, 13 Ves. 268; *Smith v. Smith*, 2 Y. & C. 361; *Whitworth v. Whydon*, 2 Mac. & G. 52.

(m) *Smith v. Smith*, 2 Y. & C. 361; see *Bainbridge v. Blair*, 4 L. J. Ch. N. S. 207.

¹ See the remarks of Baldwin, J., in *Beverley v. Brooke*, 4 Grattan, 208; also *Leddel's Executor v. Starr*, 4 C. E. Green, 163; *Harrup v. Winslet*, 27 Ga. 655; and *Delaney v. Tipton*, 3 Hayw. 14.

² *Haines v. Carpenter*, 1 Woods (Cir. Ct. R.), 265-6; affirmed on appeal, 1 Otto, 254.

is no danger to property, and no fact is in evidence to show the necessity of interfering by appointing a receiver, the court will not appoint one.⁽ⁿ⁾¹ The court will not, at the instance of one of several parties interested in an estate, displace a competent trustee, or take the possession from him, unless he has wilfully or ignorantly permitted the property to be placed in a state of insecurity, which due care or conduct would have prevented. It is not enough that the estate may have depreciated in value, and that the incumbrances thereon may have been increasing, if the management of the trustee does not appear to have been improper.^(o)

It is no sufficient cause for the appointment of a receiver that one of several trustees has disclaimed;^(p) for the disclaimer of one of several trustees does not in law affect the estate of the others, but has the effect of vesting it in them exclusively;^(q) and the testator or creator of the trust must be presumed to know what the legal consequences of the death or disclaimer of some of them must be. Where, accordingly, there are several trustees, the disclaimer of some of them is not alone a sufficient ground for the appointment of a receiver without the consent of those who remain.^(r)

⁽ⁿ⁾ *Whitworth v. Whyddon*, 434; but see *Tait v. Jenkins*, 1 2 Mac. & G. 52. Y. & C. C. C. 492.

^(o) *Barkley v. Lord Reay*, 2 (q) *Small v. Marwood*, 9 B. & Ha. 308; see *Smith v. Smith*, 2 C. 300; *Townson v. Tickell*, 3 B. Y. & C. 353. Comp. *Bainbridge* & Ald. 31.

v. Blair, 4 L. J. Ch. N. S. 207. (r) *Browell v. Reed*, 1 Ha.

(p) *Browell v. Reed*, 1 Ha. 434.

¹ See *Schlecht's Appeal*, 60 Penna. St. R. 172; *Burt v. Burt*, 41 New York, 46.

Nor is it a sufficient cause for the appointment of a receiver that the trustees or executors are poor or in mean circumstances,(s)¹ or that, being trustees for sale, they have let the purchaser into possession before they received the purchase-moneys, for the court will not necessarily infer this to be misconduct.(t)

Nor is it a sufficient cause for the appointment of a receiver that one of several trustees is inactive,(u) or has gone abroad.(x)

Misconduct, &c., a Ground for a Receiver.—If any misconduct, waste, or improper disposition of the assets can be shown,(y)² or if it appear that the trust property has been improperly managed, or is in danger of being lost,(z) there is a case for a receiver. If it can

(s) *Anon.*, 12 Ves. 4; *Howard v. Papera*, 1 Madd. 142; see *Hathornthwaite v. Russell*, 2 Atk. 126.

(t) *Browell v. Reed*, 1 Ha. 434.

(u) *Browell v. Reed*, 1 Ha. 434.

(x) *Ib.*, per Wigram, V. C.

(y) *Anon.*, 12 Ves. 4, per Sir W. Grant; see *Oldfield v. Cobbett*, 4 L. J. Ch. N. S. 272.

(z) *Middleton v. Dodswell*, 13 Ves. 266.

¹ See *Stairley v. Rabe*, McMul. Eq. 22, for an exceptional case in which a receiver was appointed.

² Where an executor who has had the actual management of the estate has wasted or misappropriated the fund in his hands, and claims that he can permit a co-executor, who is insolvent, to take funds of the estate without being responsible, and has once permitted this, and such co-executor has appropriated the funds so taken to his own use, a receiver will be appointed; *Price's Ex'r v. Price's Ex'r*, 8 C. E. Green, 428. See also *State of Illinois v. Delafield*, 8 Paige, C. R. 527; *Jenkins v. Jenkins*, 1 Paige, C. R. 243; *Janeway v. Green*, 16 Abb. Pr. R. 215 (note); *Sedgwick v. Place*, 3 Bank. Reg. 35; *Calhoun v. King*, 5 Alab. 525; *Mandel v. Peay*, 20 Arkansas, 325; *Chappell v. Akin*, 39 Georgia, 177.

be satisfactorily established that parties in a fiduciary position have been guilty of a breach of duty, there is a sufficient foundation for the appointment of a receiver.(a)¹

Where a portion of a trust fund has been lost, that loss is *primâ facie* evidence of a breach of duty on the part of the trustees, sufficient to authorize the interference of the court by the appointment of a receiver.(b) So also it was held to be a good ground for the appointment of a receiver that an executor or trustee had omitted to raise a certain sum, as he should according to the will of his testator have done, for the maintenance and education of infant legatees.(c) "To authorize the court," said Alderson, B.,(d) "to appoint a receiver, it is enough to say that the executor has not done what he could to get in the personal estate of the testator; that he has left a considerable portion of it outstanding on improper securities; and that he has not raised a certain sum, as according to the testator's will he should have done, in order that the parties might know what they had to look to."(e) So also a

(a) *Evans v. Coventry*, 5 D. M. & G. 918; see *Havers v. Brooker v. Brooker*, 3 Sm. & G. 475.

Havers, Barn. Ch. 23; *Att.-Gen. v. Bowyer*, 3 Ves. 714; *Baylies* (b) *Evans v. Coventry*, 5 D. M. & G. 918.

v. Baylies, 1 Col. 537; *Re Cormicks*, 2 Ir. Eq. 264; *Brenan v.* (c) *Richards v. Perkins*, 3 Y. & C. 307.

Preston, 2 D. M. & G. 839; *Bain-* (d) *Ib.*

brigge v. Blair, 3 Beav. 421; (e) See *Hart v. Tulk*, 6 Ha. *Bowman v. Bell*, 14 L. J. Ch. 119; 611.

Re Bywater, 1 Jur. N. S. 227;

¹ See *Walker v. Morris*, 14 Georgia, 323. That the trustee mixes trust funds with his own, is not a sufficient ground for the appointment of a receiver. *Orphan Asylum v. McCartee*, Hopkins, 429.

receiver will be appointed if it appear that the trustees have an undue leaning or bias towards one of the contending parties.(f) So also where, in consequence of disputes among the trustees, the payment of rents has been permitted to fall into arrear, on bill filed by the party entitled to the rents and profits for her life, a receiver was appointed.(g) "A receiver," said Lord Langdale,(h) "must be appointed in order to secure to her the recovery of the arrears of rents and the punctual payment of the accruing rents."¹

In *Sheppard v. Oxenford*,(i) where a man who had accepted and held moneys for certain parties upon certain trusts, afterwards denied the legality of the trust on which he held the moneys, the court appointed a receiver.

Bankruptcy, &c., of a Trustee, when a Ground for a Receiver.—If a sole executor or trustee becomes bankrupt, there is a case for the appointment of a receiver.(j) But if a testator has selected an insolvent debtor as his executor, with full knowledge of his insolvency, the court will not on the bare fact of the insolvency alone

(f) *Earl Talbot v. Hope Scott*, 4 K. & J. 139; see *Malcolm v. Montgomery*, 1 Hog. 93.

(g) *Wilson v. Wilson*, 2 Keen, 249.

(h) *Ib.* 252.

(i) 1 K. & J. 492.

(j) *Steele v. Cobham*, L. R. 1 Ch. App. 325; see *Havers v. Havers*, Barnard, Ch. 23; *Middleton v. Dodswell*, 13 Ves. 268; *Utterson v. Mair*, 2 Ves. Jr. 95; *Scott v. Becher*, 4 Pri. 346; *Hughes v. Wheeler*, 11 Beav. 178.

¹ A receiver may be appointed for the purpose of collecting a debt due to the trust estate when the trustee refuses to institute the suit. See remarks of Lord Justice James in *Sharp v. San Paulo Railway Co.*, L. R. 8, Ch. App. 609, 610:

interfere, by appointing a receiver.^(k) The practice, however, of not appointing a receiver where a testator has selected as his executor an insolvent debtor, with knowledge of his insolvency, has not gone so far as to permit a person, against whom there is evidence of insolvency, to prevail against creditors claiming to have the property secured for their benefit, when it is not more than sufficient to pay them.^(l)¹ Nor is it to be inferred, from the circumstances of the will having been made some time before the insolvency, and not altered afterwards, that the testator had a deliberate intention to intrust the management of his estate to an insolvent executor.^(m) In *Smith v. Smith*,⁽ⁿ⁾ the fact that the party who had obtained administration of the testator's real and personal estate was an uncertificated bankrupt, and was not appointed to his office by the testator, but had taken out administration to

(k) *Gladdon v. Stoneman*, 1 Madd. 143 n.; *Langley v. Hawke*, 5 Madd. 46; *Stainton v. Carron*, 18 Beav. 146, 161.
 (m) *Langley v. Hawke*, 5 Madd. 46; *Oldfield v. Cobbett*, 4 L. J. Ch. N. S. 271.
 (n) 2 Y. & C. 361.

(l) *Oldfield v. Cobbett*, 4 L. J. Ch. N. S. 272.

¹ When a debtor in failing circumstances makes an assignment for the benefit of his creditors to a person who is insolvent, a receiver will be appointed. *Haggerty v. Pittman*, 1 Paige, C. R. 298. See also *Jenkins v. Jenkins*, 1 Paige, C. R. 243; *Keyes v. Brush*, 2 Id. 311; *Ex parte Walker*, 25 Alab. 81; *Dougherty v. McDougald*, 10 Georgia, 121. In this last case a receiver was refused, but subsequently (in the same estate), upon a bill filed by a creditor against the trustee for the benefit of creditors, wherein gross mismanagement of, and imminent danger to, the property was shown, a receiver was appointed. *Jones v. Dougherty*, 10 Georgia, 274.

the widow of the testator, was held not a sufficient reason to induce the court to appoint a receiver before answer, where several of the parties interested declined to join in the application.

Poverty, &c., of Trustee, when a Ground for a Receiver.
—Although it is not a sufficient cause for the appointment of a receiver that an executor or trustee is poor or in mean circumstances, (o) the case is different if an executor or administrator be proved to be of bad character, drunken habits, and great poverty. (p)¹ So also where the executrix and guardian of infant children married a man in necessitous circumstances, a receiver was appointed. (q) So also a receiver was appointed in a case where a wife was an executrix, and the husband, besides being in indifferent circumstances, was out of the jurisdiction, because, in a case where the husband is out of the jurisdiction, there is no remedy, if the wife waste the assets; (r) but if a woman who has been deserted by her husband has obtained an order for the

(o) *Supra*, p. 20.

(q) *Dillon v. Lord Mount-*

(p) *Everett v. Prythergh*, 12
Sim. 368; see *King v. Abbotson*,
7 L. J. Exch. N. S. 6.

cashell, 4 Bro. P. C. 306.

(r) *Taylor v. Allen*, 2 Atk.
213; see *Pemberton v. McGill*, 3
W. R. 557.

¹ *Fairbairn v. Fisher*, 4 Jones (Eq.), 390. But in *Poythress v. Poythress*, 16 Georgia, 406, where a bill was filed to remove a testamentary trustee, the court held that mere bad habits and capricious conduct on the part of the trustee towards the *cestui que trust* were not sufficient to justify the appointment of a receiver, although they might be grounds ultimately for his removal from the trust. See also *Ogden v. Kip*, 6 Johns. C. R. 160. Great age is not a ground for removal. *Hosack v. Rogers*, 6 Paige, C. R. 431.

protection of her property under the 21st section of the Divorce and Matrimonial Causes Act, 20 & 21 Vict. c. 85, the court will not interfere.(s)

In a case where a married woman, whose husband was of unsound mind, was appointed executrix along with another person as her co-executor, and it appeared that the co-executor, who had taken out probate, could not sell the estate or collect the assets, a receiver was appointed.(t)

Sole Executor Abroad.—Although it is not a sufficient ground for the appointment of a receiver that one of several trustees may have gone abroad,(u) the case is otherwise if a sole executor resides abroad(v) or be abroad, and the beneficiaries under the will are unable to obtain an account from the person left in control of the property during the executor's absence.(x)¹

Receiver Appointed on Consent of Parties.—If all the *cestuis qui trustent*, or parties beneficially interested in an estate, concur in the application for a receiver, and the trustee consents, the court will make the order.(y)

(s) *Bathe v. Bank of England*, 4 K. & J. 564; see *Re house*, 2 Y. & C. C. C. 529.

Rainsdon, 4 Drew. 447; *Postgate v. Barnes*, 9 Jur. N. S. 456. (x) *Dickins v. Harris*, 14 L. T. N. S. 98; see *Faith v. Dunbar*, Coop. 200.

(t) *Yetts v. Palmer*, 9 Jur. N. S. 954. (y) *Brodie v. Barry*, 3 Mer.

(u) *Supra*, p. 20. 696; see *Bartley v. Bartley*, 9

(v) *Westby v. Westby*, 2 Co. Jur. 224.

¹ See *Ex parte Galluchat*, 1 Hill, C. R. 150; and *Edmonds v. Crenshaw*, 1 McCord, C. R. 252.

So also in a case where it appeared that one trustee had disclaimed, and that all the other parties desired it, and the other trustee consented, the court ordered that there should be a receiver.(z) So also in a case where there were two executors and trustees, and one had died and the survivor refused to act, the persons beneficially interested were held entitled to the protection of the court by the appointment of a receiver.(a) The fact that the trustee who had died may have advanced moneys out of his own pocket to an annuitant under the will, in the expectation of repayment out of assets, was not considered a sufficient ground for his representatives to resist the appointment of a receiver, in the event of the assets proving deficient.(b)

Other Cases in which a Receiver will be Appointed.—

In a case where two out of three trustees chose to act separately, and took securities in their own name, omitting that of the dissentient trustee, a *cestui que trust* was held entitled to a receiver;(c) and the court will grant a receiver at the instance of the *cestui que trust*, where the single trustee, or all the trustees, are out of the jurisdiction.(d) A receiver will necessarily be appointed where the co-trustees cannot act through disagreement among themselves.(e)

(z) *Beaumont v. Beaumont*, cited, 3 Mer. 696.

(a) *Palmer v. Wright*, 10 Beav. 237.

(b) *Ib.*

(c) *Swale v. Swale*, 22 Beav. 584.

(d) *Noad v. Backhouse*, 2 Y. & C. C. C. 529; *Smith v. Smith*, 10 Ha. App. 71.

(e) *Bagot v. Bagot*, 10 L. J. Ch. N. S. 116; *Day v. Croft*, Lewin on Trustees, 731.

In *Tidd v. Lister*(*f*) there had been four trustees, one of whom was dead and another was abroad, and the third had scarcely interfered in the trust; the business of the trust fell almost exclusively on one trustee, and upon the consent of the acting trustee, Sir J. Leach considered he was justified in appointing a receiver.(*g*) So also a receiver was granted on the misconduct of one trustee, the other executors consenting to the order.(*h*)

Implied Trusts.—In the case of misconduct by trustees, the court will appoint a receiver, as well where the trust arises by implication as where it is expressed.¹ If, for example, a tenant for life of leaseholds is bound to renew, he is in such case clothed with the character of a trustee; and if by his threats or acts he manifests an intention to suffer the lease to expire, the court will appoint a receiver in order to provide a fund for renewal.(*i*) A similar order for the appointment of a receiver of the rents and profits of an estate, for the purpose of accumulating a fund, was made where the tenant for life had fraudulently obtained a sum of stock to which the trustees of the settlement were entitled.(*k*)

In a case where a testator had bequeathed the

(*f*) 5 Madd. 433.

(*g*) 1 Ha. 434, *per* Wigram. & K. 233.

(*h*) *Middleton v. Dodswell*, 13 Ves. 268.

(*i*) See *Bennett v. Colley*, 2 M.

(*k*) *Woodyatt v. Gresley*, 8 Sim. 180.

¹ *Gunn v. Blair*, 9 Wisconsin, 352.

residue of his real and personal estate to his widow, stating in his will that he had done so "in perfect confidence that she will act up to those wishes which I have communicated to her in the ultimate disposal of my property after my decease," the court, being satisfied on the evidence that the bequest had been made on the faith of a promise made by her that she would dispose of her property in favor of the plaintiffs, the natural children of the testator, and that an implied trust was accordingly raised in their favor, granted a receiver of the real and personal estates, on the death of the widow, against the heir at law of the real estates and the second husband of the widow.(l)

Receiver Pending Proceedings Abroad.—If one of the next of kin of a foreigner were to obtain administration here, pending proceedings abroad to ascertain who the next of kin are, a bill for a receiver will lie at the suit of a party claiming as next of kin.(m)

SECTION III.—PENDING LITIGATION AS TO PROBATE.

During a litigation in the Ecclesiastical Court for probate or administration, the Court of Chancery would entertain a bill for the mere preservation of the property of the deceased till the litigation was determined, and appoint a receiver, although the Ecclesiastical Court, by granting an administrator, might

(l) *Podmore v. Gunning*, 7 Sim. 644.

(m) *Transatlantic Co. v. Pietroni*, John. 604.

have provided for the collection of the effects *pendente lite*.⁽ⁿ⁾¹ It was, indeed, a matter of course, where no

(n) *King v. King*, 6 Ves. 172; *Atkinson v. Henshaw*, 2 V. & B. 85; *Ball v. Oliver*, Ib. 96; *Watkins v. Brent*, 1 M. & C. 102 (overruling the distinction taken by Lord Erskine in *Richards v. Chave*, 12 Ves. 465); *Wood v. Hitchings*, 2 Beav. 289, on appeal 4 Jur. 858. The jurisdiction was originally assumed by the Court of Chancery, under the impression that the Ecclesiastical Court had no power to name an administrator to collect the property of a deceased person pending a contest in that court. When, however, it was decided in *Walker v. Wollaston*, 2 P. W. 576, that the Ecclesiastical Court had that power, the Court of Chancery followed the course usually adopted by it, and did not on that account abandon its jurisdiction, but continued to appoint a receiver in aid of the Ecclesiastical Court for the protection of the personal property of the deceased. *Jones v. Goodrich*, 4 Jur. 98, *per* Lord Cottenham.

¹ In *Rachel Colvin's Case*, 3 Maryl. Chan. Dec. 279. a lunatic died, leaving a will which she had made when *compos mentis*. The duties of her committee terminated on her death. An administration *pendente lite* was granted by the Orphans' Court, the probate of the will having been disputed. Previous to the grant of letters *pendente lite* a receiver had been appointed by the Court of Chancery. The appointment was held to be proper, but the duties of the receiver were said to terminate with the appointment of the administrator *pendente lite*.

The chancellor said: "There can, I presume, be no doubt of the authority of this court to protect the property of an intestate or testator, by appointing a receiver pending a litigation in the Ecclesiastical Court for probate or administration. It was assumed by Lord Eldon as free from doubt in the case of *King v. King*, 6 Vesey, 172, and although apparently to some extent shaken by Lord Erskine, in *Richards v. Chave*, 12 Vesey, 462, it has been fully and firmly established in subsequent cases. See *Edmonds v. Bird*, 1 V. & B. 542; *Atkinson v. Henshaw*, 2 V. & B. 85; *Ball v. Oliver*, Ib. 96." See also 1 Williams on Executors, 436, 437 (5th Am. ed.). The chancellor then went on to speak of Lord Eldon's doubt, as expressed in *Atkinson v. Henshaw*, when commenting on *Walker v. Woollaston*, 2 Peere Wms. 576, viz., whether the actual appointment of the

probate or administration had been granted, for the Court of Chancery to appoint a receiver, pending a *bonâ fide* litigation in the Ecclesiastical Court to determine the right to probate or administration, unless a special case were made out for not doing so.(o) In cases where the representation was in contest, and no person had been appointed executor or administrator, the court would interfere, not because of the contest, but because there was no proper person to receive the assets.(p) In *Whitworth v. Whyddon*, (q) where the person named as executor in the will was in possession of the property of his testator, the court would not take the property from him and burden the estate with the expenses of a receiver, inasmuch as the property was of trifling value, and no sufficient ground had been shown to warrant the interference of the court.

In a case where two suits had been instituted for the protection of the estate of a deceased person *pendente lite* in the Ecclesiastical Court (one in the Rolls and another in a Vice-Chancellor's Court), it was held that the fact that the plaintiff in the first suit had

(o) *Rendall v. Rendall*, 1 Ha. C. 102; see *Rendall v. Rendall*, 154, *per* Wigram, V. C. 1 Ha. 154.

(p) *Watkins v. Brent*, 1 M. & (q) 2 Mac. & G. 55.

administrator *pendente lite* would obviate the necessity for a receiver, and finally arrived at the conclusion that as soon as the administrator *pendente lite* was appointed, the functions of the receiver ought to cease. He also decided that an appeal by the receiver, from the order discharging him, was not a *supersedeas*. See also *Rice v. Tonnele*, 4 Sandf. C. R. 568. Stated *supra*, p. 16.

failed to establish the will in the Ecclesiastical Court formed no valid reason why a receiver should not be appointed in that suit, or confer any equity to the appointment of a receiver in the second suit instead, the receiver being merely for the security of the estate.^(r)

Receiver Pending Suit to Recall Probate.—If probate or administration had been granted, the circumstance that a suit was pending in the Ecclesiastical Court to recall or revoke probate or administration, was not of itself a sufficient ground for the Court of Chancery, as of course, to interfere to prevent the parties to whom probate or administration had been granted, from using those powers which it conferred upon them. If probate or administration had been properly granted, the Court of Chancery would not appoint a receiver, pending litigation in the Ecclesiastical Courts to recall or revoke probate or administration, unless a special case were made out for doing so.^(s) The general principle was stated by Turner, L. J., in *Devey v. Thornton*,^(t) to be that where there is a legal title to receive, the court ought not to interfere, unless where the legal title is abused, or there is proof that it

^(r) *Wood v. Hitchings*, 4 Jur. 1 Ha. 154; see *Whitworth v. Whyddon*, 2 Mac. & G. 52.

^(s) *Watkins v. Brent*, 1 M. & C. 102; *Connor v. Connor*, 16 L. J. Ch. 371; *Newton v. Ricketts*, 11 Jur. 662; *Rendall v. Rendall*.
^(t) 9 Ha. 229. [Followed in *Hitchen v. Berks*, L. R. 10 Eq. 471.]

is in danger of being so.¹ But if a fair *primâ facie* case of fraud were made out,(u) or if it were made to appear that the legal right to receive the assets was being abused, or was in danger of being abused, whether from insolvency or otherwise,(x) the court would appoint a receiver. So also would it appoint a receiver, if it appeared from all the circumstances of the case that there was no executor or administrator in existence with the right and power to act as such, notwithstanding there was no ground laid for interference in respect of any improper conduct of the parties.(y) Where, accordingly, the executor, by agreeing with his opponents that the question as to the validity of the supposed testamentary paper should be tried

(u) *Rutherford v. Douglas*, 1 Sim. & St. 111 n.; *Watkins v. Dew v. Clarke*, 1 Sim. & St. 114, *per* Sir J. Leach.

Brent, 1 M. & C. 102; *Dimes v. Ball v. Oliver*, 2 V. & B. 96; *Connor v. Connor*, 16 L. J. Ch. 371; *Newton v. Ricketts*, 11 Jur. 662; *Devey v. Thornton*, 9 Ha. 229.

(y) *Watkins v. Brent*, 1 M. & C. 97.

¹ See *Schlecht's Appeal*, 60 Penna. St. R. 172. The facts in this case were, that a will, appointing the defendants executors, and specifically devising to them certain real estate, had been admitted to probate by the register, and that an appeal was pending in the Register's Court, and that in the mean while the rents were being collected by the executors. The answer admitted the collection of the rents, but alleged that the defendants collected them in their capacity as devisees, and not as executors. It was held by the Supreme Court, reversing the decree of the court below, that it was not a case for a receiver. There was no averment that the defendants were insolvent or that waste was threatened. See cases cited in note x, and *infra*, Chap. II. Sect. 14.

in the suit to recall probate, had treated himself as not being complete executor, a receiver was appointed.(z) "If," said Wigram, V. C., in *Rendall v. Rendall*,(a) "the question whether the party claiming to be executor is so *de jure* or not, a receiver will be appointed." So also, in *Marr v. Littlewood*,(b) Lord Cottenham appointed a receiver, upon the application of the actual executor, pending a suit to annul probate, upon the ground that the opposing party, by having given notice to the debtors to the estate not to pay to the plaintiff, the actual executor, had destroyed the effect of the probate, and produced by his own act an incapacity on the part of the executor to proceed under the probate in collecting and preserving the assets.(c)

Probate Act.—In the Probate Act, 20 & 21 Vict., c. 77, which abolishes the testamentary jurisdiction of the Ecclesiastical Courts, and establishes a Court of Probate, it is enacted, by clause 70, that pending any suit touching the validity of a will, or for obtaining, recalling, or revoking any probate or grant of administration, the Court of Probate may appoint an administrator of the personal estate of the party deceased; and that the administrator so appointed shall have all the rights and powers of a general administrator other than the right of distributing the residue of such personal estate.(d) The 71st clause empowers the

(z) *Ib.*; see *Newton v. Ricketts*,
11 Jur. 622.

(c) 1 Ha. 156, *per* Wigram,
V. C.

(a) 1 Ha. 155.

(d) See also 21 & 22 Vict., c.

(b) 2 M. & C. 454.

95, s. 21.

Court of Probate to appoint a receiver of the real estate of any deceased person pending a suit touching the validity of his will by which his real estate may be affected; and it is declared that the receiver so appointed shall have power to receive the rents and profits of the real estate, and to let and manage the same.(e) There is nothing in the Probate Act which ousts the original jurisdiction of the Court of Chancery. If an administrator, *ad litem*, has not been appointed by the Probate Court, the Court of Chancery will, as a matter of course, appoint a receiver; but if an administrator, *ad litem*, has been appointed by the Court of Probate, the Court of Chancery will not appoint a receiver, for the administrator can do everything that is necessary for the protection of the property.(f)¹

Pleading, &c.—To warrant the application for a receiver, it must clearly appear that there is a *bonâ fide* litigation pending in the proper court, respecting probate or administration. The Court of Chancery will not interfere, unless the pendency of such a suit be distinctly alleged.(g) The mere loose allegation that

(e) See also 21 & 22 Vict., c. 95, ss. 21, 22.

(g) *Jones v. Jones*, 3 Mer. 174; *Jones v. Frost*, 3 Madd. 1 Jac.

(f) *Veret v. Duprez*, L. R. 6 Eq. 330.

466; *Marr v. Littlewood*, 2 M. & C. 458.

¹ *Veret v. Duprez*, and *Hitchen v. Birks* (*ante*, p. 31, note t), were followed by Vice Chancellor Malins, in *Parkin v. Seddons*, L. R. 16 Eq. 34.

the plaintiff is proceeding to obtain letters of administration is not enough.^(h) The court will not interfere on the ground that there is a question depending on the result of which it might appear that the plaintiff was interested.⁽ⁱ⁾

A bill for a receiver pending a litigation as to probate, ought not to seek discovery in reference to the merits of the litigation; for a plaintiff cannot by one bill obtain specific relief, and also discovery on a matter distinct from that specific relief.^(k) But the mere fact of discovery being sought by the bill will not prevent the appointment of a receiver, where there is a clear title to relief.^(l) In a case where a bill for a receiver went on to pray that, upon the administrator being appointed and brought before the court, the rights of the parties might be declared, and the estate administered, a demurrer to the latter part of the relief was allowed.^(m)

The Court of Chancery, though it will appoint a receiver to get in a testator's estate in aid of an administrator, *pendente lite*, will not do so over property of a testator claimed by a party independently of the will, though his title may be charged with fraud. Where, pending a contest in the Ecclesiastical Court between the plaintiff and the defendant, as to the validity of two wills, the plaintiff filed a bill for a receiver of the testatrix's estate, and to set aside an

(h) *Jones v. Frost*, Jac. 467.

(l) *Ib.*

(i) *Jones v. Jones*, 3 Mer. 174.

(m) *De Feuchers v. Dawes*, 5

(k) *Wood v. Hitchings*, 3 Beav. 504. Beav. 110; see *Major v. Major*, 8 Jur. 799.

assignment made by her to the defendant, the court refused to appoint a receiver of the property comprised in the assignment, that being claimed by the defendant independently of either will.(n)

A bill praying for a receiver on account of a litigation pending in the Court of Probate is not demurrable, notwithstanding the receiver was asked generally, and not pending the litigation respecting probate.(o)

The court will also appoint a proper person to protect a testator's estate, where the circumstances require it, until a legal personal representative is appointed; but a bill to protect and also to administer the estate is irregular.(p)

Though a receiver has been appointed during a litigation in the proper court respecting the validity of a will, the Court of Chancery will not, on that account alone, order the person named as executor to pay into court money in hand, belonging to the testator's estate, received previously to the appointment of the receiver.(q)

A suit to appoint a receiver pending litigation as to probate or administration should not be brought to a hearing.(r) A motion, therefore, to dismiss such a suit for want of prosecution will be refused with costs.(s) But the court will make a decree by consent

(n) *Jones v. Goodrich*, 10 Sim. 639; *Edwards v. Edwards*, 10 327; on appeal, 4 Jur. 98. Ha. App. 63.

(o) *Major v. Major*, 8 Jur. 799. (r) *Anderson v. Guichard*, 9 Ha. 275.

(p) *Overington v. Ward*, 34 Beav. 175. (s) *Edwards v. Edwards*, 17 Jur. 826.

(q) *Reed v. Harris*, 7 Sim.

for the continuance of the receiver, and for payment of costs, and the investment of the fund in court.(t) After the litigation is over in the Probate Court, the practice is to discharge the receiver and dispose of the costs; and if it appear that there was no reasonable ground for instituting the suit at all, the court will order the plaintiff to pay all the costs, though a receiver has been appointed.(u)

Receiver pending Dispute as to the Administration of the Estate of a British subject dying Abroad.—In *Hervey v. Fitzpatrick*,(x) the chief judge of the Gold Coast, as judicial assessor, claimed to be official administrator of a British subject who had died intestate, and domiciled there, and to be entitled to a commission for administering his estate. He transmitted part of the assets to this country, and came himself on leave of absence for a short time. The father of the intestate obtained letters of administration, and filed a bill against him praying a receiver. There was no evidence to show any impropriety of conduct on the part of the judicial assessor; but the court held that it had jurisdiction, as the assets and the assessor were both in this country, and, there being danger of his taking the assets again out of the jurisdiction, appointed a receiver until the matter could be adjudicated on at the hearing.

(t) *Anderson v. Guichard*, 9 Ha. 275.

(u) *Barton v. Rock*, 22 Beav. 81, 376.

(x) *Kay*, 421.

SECTION IV.—IN CASES BETWEEN MORTGAGOR AND
MORTGAGEE.

Mortgagee having the Legal Estate cannot have a Receiver.—A mortgagee who has the legal estate cannot come to the court for the appointment of a receiver, for he may by ejectment recover possession of the estate without the help of the court.(y) If he has such a right, and can proceed at law to recover the estate by ejectment, he is not entitled to have a receiver in equity.(z)¹ It is not a sufficient reason for

(y) *Berney v. Sewell*, 1 J. & W. 648; *Sturch v. Young*, 5 Beav. 557; *Ackland v. Graver-*
ner, 31 Beav. 484.

(z) *Silver v. Bishop of Nor-*
wich, 3 Sw. 115 n., *per* Lord Eldon. The security sometimes contains a power for the mortgagee to appoint a person to be receiver of the mortgaged property in order to secure to the mortgagee the regular payment of his interest out of the rents and profits of the estate; see *Jolly v. Arbuthnot*, 4 D. & J. 224; *Bord v. Tollemache*, 1 N. R. 177; *Jefferys v. Dickson*, L. R. 1 Ch. App. 190; and now by stat. 23

& 24 Vict., c. 145, ss. 11, 17, 32, a mortgagee has a power to appoint or to obtain the appointment of a receiver of the mortgaged property, unless the power be negated by express declaration in the security. A receiver, it may be observed, who has been appointed under the ordinary power for that purpose in a deed of mortgage (*Jefferys v. Dickson*, L. R. 1 Ch. App. 190, see *Bord v. Tollemache*, 1 N. R. 177), or under the provision of 23 & 24 Vict., c. 145, is in possession as the agent of the mortgagor; *ib.* s. 18.

¹ A mortgage in most of the United States is regarded merely as a security for the debt, and in many States it does not even pass the legal title to the mortgaged property, and does not give the mortgagee the right to recover possession by ejectment. Washburn on Real Prop., vol. i. p. 516; Kent's Com., vol. iv. p. 155; Adams' Equity, 110; *Syracuse Bank v. Tallman*, 31 Barbour, 207; *McMillan v. Richards*, 9 Cal. 365; *Mack v. Wetzlar*, 39 Id. 254. It has

the court to depart from the general rule that the tenants may be numerous, and that there may be dif-

consequently been held in some cases that the complainant in a foreclosure suit, or in analogous statutory proceedings, although a first mortgagee, will, under certain circumstances, be entitled to a receiver. See *Hyman v. Kelly*, 1 Nevada, 183, where the doctrine upon this subject is well considered. In New York it is said that "the rule in these cases, when the mortgagee has not taken care to keep down the accruing interest by securing a lien on the rents and profits, is to interfere with the mortgagor's possession prior to a decree of foreclosure, and appoint a receiver of the rents and profits, when the premises are an inadequate security for the debt secured by the mortgage, and the mortgagor or other person in possession who is personally liable for the debt is not of sufficient ability to answer for the deficiency." *Warner v. Gouverneur's Ex'rs*, 1 Barbour, 36. See also *Bank of Ogdensburgh v. Arnold*, 5 Paige, C. R. 38-42; *Shotwell v. Smith*, 3 Edw. C. R. 588; *Sea Insurance Company v. Stebbins*, 8 Paige, C. R. 565; *Astor v. Turner*, 11 Id. 436; *Frelinghuysen v. Colden*, 4 Id. 204; *Syracuse Bank v. Tallman*, 31 Barb. 201. But such an appointment is made with caution, and only when it appears that there is a clear inadequacy of security. *Shotwell v. Smith*, 3 Edw. C. R. 588; *Pullan v. Cincinnati and Chicago R. R.*, 4 Biss. 35, 49, 50. And when the mortgaged property can be sold in parcels, and one parcel is sufficient to satisfy the mortgage debt, a receiver will not be appointed over the whole. *Quincy v. Cheeseman*, 4 Sand. C. R. 405. In Iowa the appointment of a receiver at the instance of a mortgagee as against a mortgagor in possession is looked upon as an appointment *against* the legal title, and is therefore to be governed by the same rules as are established in England in regard to the appointment of a receiver upon the application of a second mortgagee when a prior mortgagee is in possession. *Callanan v. Shaw*, 19 Iowa, 183. *Infra*, p. 44. See also *Henshaw v. Wells*, 9 Humph. 567.

In Mississippi the question was elaborately argued and carefully considered in the recent case of *Myers v. Estell*, 48 Miss. 372. The court said: "Upon what principle may a receiver be appointed in a foreclosure suit? Unless there be a stipulation in the contract that the mortgagee shall have the rents, he has no claim merely on the ground that the debt is due and the title has become absolute. He may enter after default made, or he may recover possession at law, and out of the rents and profits satisfy the debt; that is one of

ficulty in collecting the rents ;(a) or that the exercise of the legal right may be obstructed by difficulties.(b)

(a) *Sturch v. Young*, 5 Beav. L. 680; see *Brady v. Fitzgerald*, 557. 12 Ir. Eq. 278.

(b) *Cremen v. Hughes*, 2 J. &

his remedies, more commonly employed in Great Britain than in this country. But if he proceeds to foreclose he elects to raise the money by a sale of the property. . . . The mortgagee or trust creditor, if he has no lien upon the rents, must rest his claim to them on the ground that the property is insufficient to pay the debt, and that without the redress he will lose the residue of it; or he must go upon the predicate that it is necessary to interfere with the mortgagor's possession in order to prevent the removal of the property beyond the reach of the court, or to save it from wasture and deterioration. In these latter circumstances, the debtor perpetrates a positive wrong, which either endangers altogether a realization of the fruits of the suit, or diminishes the value of the security. The election of the chancery forum is to prefer to convert the property into money and pay the debt, rather than the legal remedy to get payment out of the rents and profits. In this case the application is to be maintained, if at all, upon the allegation of the insufficiency of the property to pay the debt. If the only means or source of payment was out of the property, the creditor could present a very urgent reason why the property should be made to produce the utmost farthing pending the litigation. But suppose the debtor is abundantly able to pay the deficit, upon sale of the mortgaged premises, and there is, therefore, no apparent danger that the creditor will lose any part of his debt, must a receiver be appointed? The bill does not in terms allege that Myers is personally insolvent, or that he is unable to pay an expected deficiency on foreclosure sale." The court then reviewed some of the English and American authorities and went on to say: "Regarding the mortgage as more especially a security for the debt, we think the better rule to be that which will grant the receiver or not as it may or may not be an essential means to pay the debt. There can be no necessity for this auxiliary remedy if the mortgagee is solvent and able to pay any deficiency. In such cases the creditor ought to be left to his legal remedy to get at the rents." The court then proceeded to discuss the difference between an ordinary mortgage and the case of a

Upon the same principle the court would not grant a receiver to an equitable incumbrancer, whose security

security in the form of a deed of trust, and called attention to the fact that in the case under consideration the trustee had simply the power to sell and no power to enter and take the rents as could be done by a first mortgagee; and, reaching the conclusion that in the case of a trust deed the appointment of a receiver must depend very much upon the circumstances of the case, said: "In view of the fact that the property is a precarious security for the debt, and the further fact that the obligations of tenants for rent amounting to several thousand dollars, have been assigned to a non-resident, in part to create a fund subject to Myers' control out of the State; of the fact that he has conveyed one-third of the plantation in trust for his children; that he has combined with the trustee and deprived the complainant of the enforcement of the trust security according to its tenor and, notwithstanding the forbearance of the creditor for four years, has made no payment on the debt, ought he to be suffered to reap the advantages which he has thus obtained? We think not. In no other mode productive of such little injury to either party, can this be done, as entrusting the property to a receiver, whose control over it will not be adverse or hostile to either, but who will hold it and its income so as to answer the ends of justice when the final decree shall be rendered. If, as stated in the answer, the sale was advertised to have been made in Washington County instead of Bolivar, or if the suit had been brought prematurely, it would have been the duty of the trustee to have called in the advertisement and to have dismissed the suit, so that there might have been a rectification of the mistakes and errors. But he abandoned the trust altogether. The non-payment of taxes or suffering the title to be embarrassed by a tax sale (*Wall Street Ins. Co. v. Loud*, 20 How. Pr. 96) or the unfairness of the covenant of the mortgagor, will justify the appointment of a receiver. *Finch's Adm'r v. Houghton*, 19 Wis. 158; *Callanan v. Shaw*, 19 Iowa, 183. We think that the combined influence of the circumstances in this case authorized the chancellor to appoint a receiver." See, also, *Whitehead v. Wrothen*, 43 Miss. 523. The rule, therefore, in Mississippi seems to be that while in the case of an ordinary mortgage a receiver will not be appointed unless the mortgaged premises are inadequate to secure the debt and the mortgagor is insolvent, yet that such an appointment will be made where the security has assumed the shape of a deed of trust which does not give the trustee the power of enter-

was vested in a trustee with powers of distress and entry.(c)

(c) *Buxton v. Monkhouse*, *Sollory v. Leaver*, L. R. 9 Eq. Coop. 41; comp. *White v. Smale*, 22.]
22 Beav. 73; *infra*, p. 44. [See

ing and taking the rents, and where the special circumstances of the case are such as to call for the interposition of the court.

In New Jersey, however, an opposite doctrine is held. The courts do not follow the New York rule, that the insolvency of the mortgagor and the inadequacy of the security will justify the appointment of a receiver. *Cortleyou v. Hathaway*, 3 Stockton, 39. "The rule so broadly laid down," says the chancellor, "is not sustained by precedents, and is not free from objections. No distinction is drawn between a first and subsequent mortgagee. Their rights are entirely different. The first mortgagee has a legal right to the rents and profits, but a court of equity has been reluctant to appoint a receiver upon his application, for the reason that he has a remedy at law by ejectment, by which he may get into the receipt of the rents and profits." And again: "The rule as laid down by the New York cases has never been adopted by the Court of Chancery in this State. It has not been the practice in this court to appoint a receiver in a mortgage case simply on the ground of inadequacy of the mortgaged premises to pay the debt, and the mortgagor's being insolvent. This court has gone upon the ground, that, where a man takes a mortgage security for his debt, and permits the mortgagor to remain in possession, if there is a default in payment, the mortgagee must appropriate the property in the usual way to the payment of his debt. If he is a first mortgagee, and wishes possession, he must take his legal remedy by ejectment. If he is a second mortgagee, he takes his security with the disadvantages of a second incumbrance. The application for receivers in mortgage cases has been very unusual in this court. There is no reported case. There was an application to Chancellor Pennington, and it was successful; but the circumstances of the case I have not been able to ascertain. Subsequently Chancellor Halstead, in the case of *Best v. Shermier*, 2 Hals. C. R. 154, refused the application on behalf of the mortgagee, on the ground that such had not been the practice of this court." Id. p. 43. And this rule was approved and followed in the later case of *Frisbie v. Bateman*, 9 C. E. Green, 28. And so in *Beverley*

Except in Special Cases.—Under special circumstances, however, a receiver may be granted at the instance of a mortgagee having the legal estate. Where, for example, A., together with B., mortgaged their respective estates for the debt of A., but it was provided in the deed that recourse should not be had to B.'s estate unless A.'s estate should prove insufficient, and, upon bill of foreclosure, the insufficiency of A.'s estate was denied, a receiver was appointed, on the ground that if the plaintiff were to bring ejectment, it would be in the power of B. to deny the insufficiency of A.'s

v. *Brooke*, 4 Grattan, 209, it was said: "But equity will not, unless in a very strong case, disturb his (the mortgagee's) possession by the appointment of a receiver on the application of a subsequent mortgagee, or other equitable incumbrancer, and never if the validity of his mortgage be unimpeached, and he swears there is anything due to him. On the other hand, because of the remedies which the mortgagee of the legal estate has in his own hands, equity will never appoint a receiver on his application." See also *Williams v. Robinson*, 16 Conn. 524, *Morrison v. Buckner*, Hempstead, 442; and *Oliver v. Decatur*, 4 Cranch., C. C. R. 458. These conflicting authorities may perhaps be reconciled upon the theory stated above, namely, that in those States where a receiver will be appointed, the common law rule that the legal title to the mortgaged premises is in the mortgagee, and that he is entitled to bring ejectment, has been modified or entirely abrogated, and the equitable remedy by appointment of a receiver is adopted in the absence of relief by the common law action. See *Hyman v. Kelly*, 1 Nevada, 187, and the remarks in that case on *Guy v. Ide*, 6 Cal. 101.

In some States the appointment of a receiver at the suit of a mortgagee is authorized and regulated by statute. Such is the case in Ohio (Seney's Code, Title VIII. Chap. V.), Kentucky (Myers' Code of Practice, 95 and 96), and Kansas (General Stats. 677).

After a decree of foreclosure, the appointment of a receiver to take charge of the mortgaged premises is said to be unusual. *Adair v. Wright*, 16 Iowa, 385.

See also, on the general subject, *Cheever v. The Rutland Railroad Co.*, 39 Vermont, 653; *Noyes v. Rich*, 52 Maine, 115.

estate, and that the defence, if set up at law, would lead to the trial of questions of account which might be tried much more satisfactorily in equity.(d) So, also, a mortgagee of leaseholds, who has made advances to preserve the premises from eviction for non-payment of rent by the mortgagor, may apply for a receiver, notwithstanding that the interest on the mortgage debt may have been regularly paid.(e) So, also, in a suit on behalf of a number of grantees of rent-charges on the same property, who had powers of distress and entry, a receiver was appointed to protect the property pending the litigation, it being untenanted, and it being impossible to obtain tenants, for want of protection against the powers of the several grantees of the rent-charge.(f)¹

Receiver not appointed against a Prior Legal Mortgagee in Possession at Suit of Second Mortgagee.—The court will not appoint a receiver at the instance of a second mortgagee or equitable incumbrancer, against a prior

(d) *Ackland v. Gravenor*, 31 Beav. 482. (f) *White v. Smale*, 22 Beav. 73; see *Cupit v. Jackson*, 13 Pri.

(e) *Kelly v. Staunton*, 1 Hog. 393. 734; *White v. James*, 26 Beav. 191; *Hall v. Hurt*, 2 J. & H. 76.

¹ And where the whole mortgage debt was due, and large arrears of interest had accrued, and the party in possession had neglected to pay the taxes, and had also endeavored to defeat the mortgage by conveyances under tax-titles, it was held that this was such negligent and unfair conduct as would justify the appointment of a receiver. *Finch v. Houghton*, 19 Wis. 149. And see *Brown v. Chase*, Walker's Ch. Rep. 43; *Callanan v. Shaw*, 19 Iowa, 183; *Simpson v. Roberts*, 35 Georgia, 180; *Wall Street Ins. Co. v. Loud*, 20 How. Pr. R. 95; and *Clagett v. Salmon*, 5 Gill & J. 314.

legal mortgagee in possession, as long as anything remains due to him on the mortgage security. A prior legal mortgagee in possession, having anything due to him, is entitled to retain that possession until he is fully paid.¹ When a prior mortgagee is in possession, a receiver will not be appointed against him except on his own confession that he has been paid off, or on his refusal to accept what is due to him.(g) If he swear that something is due to him on the mortgage security, no receiver will be appointed against him,(h)² and the only course is to pay him off according to his own statement of the debt.(i) It is not necessary, in order to save his possession, that he should be able to state with any great precision what sum is due to him. It is enough if he can swear that something is due to him (however small it may be) on the security.(k) If he distinctly says by his answer that something is due to him, the court will not try the truth of the statement by affidavits against the answer.(l) If, however, he will not state that something is due to him, the court will appoint a receiver.(m) The state-

(g) *Berney v. Sewell*, 1 J. & W. 659; *Hiles v. Moore*, 15 Beav. 180. (k) *Chambers v. Goldwin*, cited 13 Ves. 378; *Quarrell v. Beckford*, 13 Ves. 378.

(h) *Chambers v. Goldwin*, cited 13 Ves. 378; *Quarrell v. Beckford*, 13 Ves. 378. (l) *Rowe v. Wood*, 2 J. & W. 558.

(i) *Berney v. Sewell*, 1 J. & W. 647; *Rowe v. Wood*, 2 J. & W. 557. (m) *Chambers v. Goldwin*, cited 13 Ves. 378; *Quarrell v. Beckford*, 13 Ves. 378; *Rowe v. Wood*, 2 J. & W. 558.

¹ *Callanan v. Shaw*, 19 Iowa, 183.

² *Quinn v. Britain*, 3 Edw. C. R. 314.

ment must, in order to satisfy the court, be a distinct and positive statement. It is not enough that it should merely amount to a vague assertion,⁽ⁿ⁾ or that he should say in general terms that he believes that, when the accounts are taken, some particular sums, and parts of other sums, will be found due, without supporting the statements by any accounts which will serve to test its truth.^(o) Nor can the incomplete state of his accounts be admitted as an excuse for his not being able to say that something is due to him. If a mortgagee in possession keep his accounts so negligently that neither he, nor a subsequent incumbrancer, nor the owner of the estate, can ascertain what is due, the court may assume that nothing is due, and appoint a receiver.^(p) Time, however, may be given him to make an affidavit of the debt.^(q)

The rule that a receiver will not be granted against a prior legal mortgagee in possession as long as anything remains due on the mortgage security, applies equally, whether the priority is original or has been acquired subsequently by an assignment of the mortgage.^(r) Where, accordingly, as between two equitable incumbrancers, the one later in date had acquired the legal possession, the court would not, at the suit of the one who was prior in date, appoint a receiver.^(s)

⁽ⁿ⁾ *Hiles v. Moore*, 15 Beav. 181.

^(o) *Ib.*

^(p) *Codrington v. Parker*, 16 Ves. 469; *Hiles v. Moore*, 15 Beav. 180.

^(q) *Codrington v. Parker*, 16 Ves. 469.

^(r) *Berney v. Sewell*, 1 J. & W. 648; *Hiles v. Moore*, 15 Beav. 181; *Bates v. Brothers*, 17 Jur. 1174, 2 Sm. & G. 509.

^(s) *Bates v. Brothers*, *Ib.*

The rule that a receiver will not be appointed against a prior legal mortgagee in possession, only applies as long as anything is due with reference to which the mortgagee has a right to retain possession.^(t) It is not the rule of the court that a third mortgagee, who has advanced his moneys with notice of the second mortgage, and who has taken possession, and has then bought up a first incumbrance, can retain it as against the second mortgagee, after the first mortgage has been paid off.^(u)¹

The rule that a receiver will not be appointed against a prior legal mortgagee in possession, has been held to apply in favor of persons in possession, entitled to a mortgage and prior charges on the estate, though they had applied part of the rents in payment of the interest on those charges, instead of discharging the principal of the mortgage; it being the proper course, as between the tenant for life, and the owners of the inheritance, to keep down such interest out of the rents, and not to treat the surplus rents, after payment of the interest of the unpaid part of the principal, as applicable to the discharge of such unpaid principal.^(x)

In order to deprive an equitable mortgagee of his

^(t) *Codrington v. Parker*, 16 Ves. 469.

^(x) *Faulkner v. Daniel*, 3 Ha. 204 n., 10 L. J. Ch. N. S. 34.

^(u) *Hiles v. Moore*, 15 Beav. 181.

¹ Where the premises are of doubtful security, the first mortgagee may have a receiver as against a second mortgagee who has foreclosed and bought in the property. *New York Life Ins. Co. v. Glass*, 50 How. Pr. R. 81.

right to a receiver, the possession of the party must be such a possession as invests him with a title to receive the rents and profits. A mere possession as tenant is not sufficient. An incumbrancer who is in possession, not in that character, but as tenant, cannot set up his possession as tenant as a reason against the appointment of a receiver. A second mortgagee, having sold part of his mortgage to the tenant in possession of part of the premises, applied for a receiver; the tenant in possession objected on the ground that the rent which he was to pay was just equal to the interest he was entitled to receive on his share of the money due on the mortgage, and that therefore it would but increase the expense by his paying into court as rent what he must receive back as interest. But it was held that the defendant could not unite his two characters of mortgagee and tenant, and that his position being as tenant could not be set up against the other mortgagee.(y)

In particular Cases Receiver appointed against Legal Mortgagee in Possession.—Although a receiver will not as a general rule, be appointed against a prior legal mortgagee in possession, the court may if a case of gross mismanagement of the estate be made to appear, deprive a mortgagee of possession by appointing a receiver; but to warrant such an interference the mismanagement must be of a clear and specified nature.(z)

(y) *Archdeacon v. Bowes*, 3 Aust. 752.

(z) *Rowe v. Wood*, 2 J. & W. 553.

In *Rowe v. Wood*,^(a) a motion for the appointment of a receiver upon a mortgage of mines, who had become a partner by purchasing shares in them, upon the ground of mismanagement, and excluding the mortgagee, upon interference was refused; it not being shown and the mortgagee not admitting that the mortgage was satisfied. It was also said that the rights and duties of a person in that situation were not to be governed solely by principles applicable to one who stands simply in the character of a mortgagee or partner, and that if a first mortgagee in possession can in any case be deprived of that possession on the ground of mismanagement, it must be mismanagement of a clear and specified nature.

Though it could not appoint a receiver, the court, however, ordered that the plaintiff had a clear right, subject to the equities which might ultimately be declared between the parties, to insist that regular accounts should be kept of all receipts, payments and transactions relative to the mine, and to have constant access for the purpose of inspecting the accounts; and declared also that, subject to those equities, he had a clear right to control the working of the mine, and that if he was impeded in the exercise of any of those rights he should come to the court again.^(b)¹

(a) *Rowe v. Wood*, 2 J. & W. 553. (b) *Ib.* 559.

¹ A receiver with modified power was appointed in *Thompson v. Van Vechten*, 5 Duer, 618. In that case a junior mortgagee of a steamboat filed a bill praying for a receiver. A few days prior to

Receiver appointed against Prior Legal Mortgagee, if not in Possession.—Although an equitable mortgagee or incumbrancer cannot have a receiver appointed against a prior legal mortgagee in possession, the case is different if the prior legal mortgagee is not in possession. If an incumbrancer having a prior legal estate be not in possession, whether from refusing to take possession or from being otherwise out of possession, an equitable incumbrancer having a charge subsequent in date may have a receiver, without prejudice, however, to the right of the person having a prior legal estate to take possession, if he think fit.(c)¹

(c) *Bryan v. Cormick*, 1 Cox, was appointed at the suit of a 422; *Dalmer v. Dashwood*, 2 puisné incumbrancer, and the first Cox, 383; *Davis v. Duke of Marlborough*, 2 Sw. 135; *Berney v. Sewell*, 1 J. & W. 648; *Tanfield v. Irvine*, 2 Russ. 151; legal incumbrancer was not entitled to take possession because he was by the terms of his security obliged before doing so to give three months notice after default made in payment of the mortgage money. *Rhodes v. Mostyn*, 17 Jur. 1007; comp. *Coope v. Creswell*, 12 W. R. 299; see *Langton v. Langton*, 7 D. M. & G. 30, where a receiver

the commencement of this suit the U. S. Marshal had taken possession of the vessel under liens of material-men. The court declined to appoint a receiver with authority to take possession, but appointed one to represent in the U. S. District Court those persons who had not filed libels, and to receive the surplus, if any, and to distribute it under the control of the court.

¹ In an earlier case, *Phipps v. The Bishop of Bath & Wells*, 2 Dickens, 608, where the first mortgagee was not in possession, a receiver was refused, Lord Thurlow saying, "a second mortgagee, the mortgagor living, cannot have a receiver without the consent of the first mortgagee, because the court cannot prevent the first mortgagee from bringing an ejectment against the receiver as soon as he is ap-

If a mortgagee will not take possession, a receiver will be appointed without his consent. The court will not allow a prior legal incumbrancer to object to the appointment of a receiver by anything short of a personal assertion of his legal right, and on taking possession himself.^(d)¹ If care be taken that a prior mortgagee is not prejudiced, he has nothing to do with the motion for a receiver. He may enter as mortgagee; and the appointment of a receiver will not prejudice that right. The habit of the court on such a motion is not to look at mortgagees further than to see that they are not prejudiced.^(e)

The court may in a suit instituted by a puisné mortgagee appoint a receiver, although the first mortgagee has by his deed of security a power to appoint one.^(f)

The appointment of a receiver may be made at the suit of a puisné mortgagee or other legal incumbrancer, for the purpose of keeping down the interest, even though the applicant be unable at the time to enforce the usual mortgagee's remedies, as if he have covenanted not to call in the mortgage debt during a certain time;^(g) and though by the transaction itself the

^(d) *Silver v. Bishop of Norwich*, 3 Sw. 114 n.

^(f) *Bord v. Tollemache*, 1 N. R. 177.

^(e) *Norway v. Rowe*, 19 Ves. 153, *per* Lord Eldon.

^(g) *Burrows v. Molloy*, 2 J. & L. 521.

pointed;" but the later cases (see note c) have established the rule as stated in the text.

See also *Cortleyeu v. Hathaway*, 3 Stockton 39-42; *State of Maryland v. The Northern Central R. R. Co.*, 18 Maryl. 213.

¹ See *Wiswall v. Sampson*, 14 Howard, 65.

security gave the creditor no right to be considered as a mortgagee of the estate, but only made the rents a fund for the payment of interest and of the premiums upon a policy of insurance, out of the produce of which the principal was to be paid.(h)

Arrears of Interest a Ground for Receiver.—It is enough to grant a receiver at the suit of a second or puisné mortgagee that the payment of interest is in arrear,(i) or that there is reason to apprehend that the property is insufficient to pay the charges, or is in danger of being evicted (*e.g.*, for non-payment of head rent).(k)¹

Parties.—To a bill by second or third mortgagees for a receiver, it is not necessary to make the first mortgagees parties to the suit.(l)

(h) *Taylor v. Emerson*, 4 Dr. & War. 122.

(i) *White v. Bishop of Peterborough*, 3 Sw. 109; *Plaskett v. Dillon*, 1 Hog. 201; *Tanfield v. Irvine*, 2 Russ. 151; *Wilson v. Wilson*, 2 Keen, 249; see *Hopkins v. Worcester and Birmingham Canal Co.*, L. R. 6 Eq. 447.

(k) *Herbert v. Greene*, 3 Ir. Ch. 273; see *Plaskett v. Dillon*, 1

Hog. 201; *Hacket v. Snow*, 10 Ir. Eq. 220.

(l) *Dalmer v. Dashwood*, 2 Cox, 383; *Davis v. Duke of Marlborough*, 1 Sw. 77; but see *Price v. Williams*, Coop. 31.

¹ It is said in *Post v. Dorr*, 4 Edw. C. R. 412, to be an established rule that a second or third mortgagee who succeeds in getting a receiver appointed becomes thereby entitled to the rents collected during the appointment, although (in New York) a prior mortgagee steps in and obtains a receivership in his behalf, and fails to obtain enough out of the property to pay his debt. This is on the principle that the mortgagee acquires a specific lien on the rents by obtaining the appointment of a receiver of them.

See also *Howell v. Ripley*, 10 Paige, C. R. 43; *Thomas v. Brigstocke*, 4 Russ. 64; *post*, Chap. VI.

Mortgagee of Tolls, &c., may have a Receiver.—A mortgagee of turnpike or other tolls may come to the court for a receiver, instead of taking steps to obtain possession at law.^(m) “Under an ordinary mortgage,” said Turner, L. J.,⁽ⁿ⁾ “the mortgagee when he enters into possession holds for his own benefit. Under a mortgage of this description he becomes, when he enters into possession, liable to the other mortgagees to the extent of their interest. This liability would entitle him, upon possession taken, to come to the court to have it ascertained what is due upon the other mortgages, and for a receiver to aid him in the due application of the tolls; and if this court can be called upon to appoint a receiver immediately after the possession recovered at law, it can hardly be necessary that the proceeding at law should first be taken.”

Equitable Mortgagee may have a Receiver.—A receiver may be appointed on the application of an equitable mortgagee in a foreclosure suit or other suit for enforcing his security against the mortgagor in possession having the legal estate.^(o) So, also, a receiver may be appointed on the application of an equitable mortgagee against a person in possession under agreement of assignment from a person having the legal title.^(p) In *Holmes v. Bell*^(q) a receiver of the rents and profits

(m) *Lord Crewe v. Edleston*, 620; see *Crowe v. Halliday*, 2 1 D. & J. 93. Ridg. P. C. 58.

(n) *Ib.* 109.

(p) *Reid v. Middleton*, T. & R.

(o) *Reid v. Middleton*, T. & R. 455.

255; *Aberdeen v. Chitty*, 3 Y. & (q) 2 Beav. 298.

C. 379; *Meaden v. Sealey*, 6 Ha.

of an estate belonging to the defendants as tenants in common, was appointed at the suit of equitable mortgagees, though one of the mortgagors was out of the jurisdiction, the whole of the rents being received by the other.

Form of Order for Receiver at Suit of Subsequent Incumbrancers.—If a receiver is appointed on behalf of one of several incumbrancers, the order generally contains a declaration that the appointment of the receiver is to be without prejudice to the rights of, or is not to affect the prior incumbrancers on the estate, who may think proper to take possession of the estates and premises by virtue of their respective securities; and usually directs that the receiver do, out of the rents and profits to be received by him, keep down the interest and payments in respect of such incumbrancers, according to their priorities, and be allowed the same in passing his accounts.^(r)

Whether a Receiver can be had in a Redemption Suit.—There is a difficulty in granting a receiver in a redemption suit, because it is not generally competent for a defendant to apply for relief against a plaintiff without filing a cross-bill.^(s) A receiver was accordingly refused on an application after the hearing, to add the appointment of a receiver to the decree; but

^(r) Set. on Decr. 1026, 1027; ^(s) See *Wynne v. Griffith*, 1 see *Lewis v. Zouche*, 2 Sim. 388, Sim. & St. 147, *Brown v. New-393*; *Smith v. Lord Effingham*, all, 2 M. & C. 574, *infra*.
2 Beav. 232.

it was said that perhaps it might have been done on petition, upon due notice being given.^(t) And even when the plaintiff has asked for a receiver by his bill, the court will not make the appointment on the defendant's application, if the plaintiff oppose it, but no costs will be given under such circumstances to the plaintiff.^(u)

Receiver is in Law the Agent of the Mortgagor within 3 & 4 Will. 4, c. 71.—When an estate is mortgaged, and a receiver is appointed at the suit of mortgagees, the receiver is, in law, the agent of the mortgagor, the owner of the estate subject to the mortgage, and payment by him in pursuance of the order is payment by the legal agent of the party liable to pay within the 40th section of 3 & 4 Will. 4, c. 27.^(x)

SECTION V.—IN CASES BETWEEN DEBTOR AND CREDITOR.

Receiver Appointed at Suit of General Creditor.—General creditors may, like specific appointees of property, have a receiver of the property of a debtor.^(y) In a case, accordingly, where it is made to appear that an executor or devisee of the real estate is wasting the real or personal estate, a receiver will, it would seem, be appointed at the instance of simple contract credi-

^(t) *Barlow v. Gains*, 8 Beav. 330. ^(y) *Owen v. Homan*, 4 H. L. 1036; *Oldfield v. Cobbett*, 4 L. J.

^(u) *Robinson v. Hadley*, 11 Beav. 614. Ch. N. S. 272; see *Largan v. Bowen*, 1 Sch. & Lef. 296.

^(x) *Chinnery v. Evans*, 11 H. L. 134.

tors.(z) So also where upon bill by creditors claiming satisfaction out of real and personal assets, it appeared that the real estate must eventually be responsible, as there was no personal estate to be applied to discharge the debts, a receiver was appointed.(a) So also in a case where a bill was filed by creditors for satisfaction out of the personal assets, and if those were not sufficient, out of the real estate, descended to an infant heir, the court appointed a receiver of the real estate descended.(b)

If the real estates over which a receiver is sought are in mortgage, but the mortgagee is not in possession, a receiver will be appointed on the application of creditors, without prejudice to the right of the mortgagee to take possession.(c)

Though general creditors may, like specific appointees of property, have a receiver of the property of the debtor, a strong case must be made out to warrant the interference of the court. The court will not, unless a clear case be established, deprive a person of property in which the claimant has no specific claim, in order that, if he establish his claim as a creditor, there may be assets wherewith to satisfy

(z) See *Keene v. Riley*, 3 Mer. 436.

(b) *Sweet v. Partridge*, 1 Cox, 433; 2 Dick. 696; see *Lechmere*

(a) *Jones v. Pugh*, 8 Ves. 71; *Chalk v. Raine*, 13 Jur. 981; see *Coope v. Cresswell*, 12 W. R. 299; *Topping v. Searson*, 6 L. T. N. S. 450.

v. *Brasier*, 2 J. & W. 287.

(c) *Bryan v. Cormick*, 1 Cox, 422; see *Berney v. Sewell*, 1 J. & W. 648; *supra*, p. 50.

it.(d)¹ The anomalous nature of the right when the plaintiff is claiming as a general creditor of a married woman, and is seeking payment out of her separate estate, and the inability of the court to govern the proceedings in equity in such a case by rules strictly conformable to those which regulate an action at law, may warrant the *interim* interference by a receiver. But a chance of doing a wrong to the defendant in such a case is certainly much greater and more apparent than when a right asserted is a right against some specific fund or estate.(e)²

(d) *Owen v. Homan*, 4 H. L. 1036. (e) *Owen v. Homan*, 4 H. L. 1036.

¹ See *Uhl v. Dillon*, 10 Maryland, 500; *Hubbard v. Hubbard*, 14 Id. 356; *Brady v. Furlow*, 22 Geo. 613; *McGoldrick v. Slevin*, 43 Ind. 522; and *Warfield v. Owen*, 4 Gill, 380. In *Cohen v. Myers*, 42 Georgia, 46, a receiver was appointed at the suit of a creditor, who had not obtained judgment. The circumstances of that case, however, were somewhat peculiar. See also *Kuhl v. Martin*, 11 C. E. Green, 60, where a receiver was appointed.

² In *Todd v. Lee*, 15 Wisconsin, 365, an action was brought to subject the separate property of the defendant, a married woman, to the payment of debts incurred by her in separate trade. The action was commenced in the County Court, where an injunction was granted and a receiver appointed. This decision was overruled by the Circuit Court, the injunction dissolved, and the order for a receiver vacated. But upon appeal to the Supreme Court the decree of the Circuit Court was in its turn reversed, the court saying: "The issuing of the injunctions and appointment of the receiver in these cases was under the circumstances undoubtedly correct. They take the place of the process of attachment when necessary and proper at law. Such was the practice under the former system of equity, when there were no trustees of the separate estate, and the fund was in danger of being wasted or put beyond the reach of creditors. It was the course pursued in *Lilia v. Airey*, 1 Vesey, 277, and in *Methodist Episcopal Church v. Jaques*, 1 John. C. R. 450. And

Receiver Appointed at Suit of Equitable Creditors.—The doctrine of the court as to entertaining applications for a receiver at the suit of equitable creditors, has been thus stated by Lord Eldon in *Davis v. Duke of Marlborough*:(f) “The rule I take to be that the court will on motion appoint a receiver for an equitable creditor, or a person having an equitable estate, in this sense without prejudice to persons who have prior legal estates, that it will not prevent their proceeding to take possession if they think proper;(g)¹ and with regard to persons having prior equitable estates, the court takes care not to disturb prior equities, and for that purpose directs inquiries to determine priorities among equitable incumbrancers, permitting legal creditors to act against the estates at law, and settling the priorities of equitable incumbrancers. Provided it is satisfied in that stage that the relief prayed by the bill will be given when a decree is pronounced, the court will not expose parties claiming that relief to the danger of losing the rents, by not appointing a receiver of an estate on which it is admitted they cannot enter.”²

In favor of equitable creditors the court will appoint

(f) 2 Sw. 137, 138.

v. *Cormick*, 1 Cox. 422; *Angel*

(g) But they must first obtain v. *Smith*, 9 Ves. 335.

the leave of the court. *Bryan*

instances of an injunction where there were trustees are very numerous.” See, in this connection, *Penn v. Whiteheads*, 12 Grattan, 74.

¹ A court of equity will not interfere by injunction and receiver on behalf of one creditor to restrain another from obtaining satisfaction by means of a prior levy upon the debtor's goods. *Gravenstine's Appeal*, 49 Penna. St. R. 310. See also *Ellicott v. U. S. Ins. Co.*, 7 Gill, 319; and *Waring v. Robinson*, Hoffman, C. R. 524.

² See *Cortleyeu v. Hathaway*, 3 Stockton, 42–43.

a receiver over property against which legal creditors might obtain execution. If courts of law hold that certain property may be taken on legal execution, courts of equity cannot consistently hold that it is not to be taken on equitable execution. There is no principle on which, supposing a legal creditor to have the right to take an estate in execution, it should not equally extend to an equitable creditor.^(h) If the estate is in the possession of judgment creditors, and the plaintiff has acquired an estate which, if it had been legal, might enable him to turn out the judgment creditors, but being equitable, he cannot proceed at law, the case is that of an equitable creditor with an estate for securing his debt, applying to this court to have execution given to him here.⁽ⁱ⁾ The principle on which a receiver is appointed in this: when a bill is filed stating that the plaintiff has an equitable estate, and consequently cannot recover at law, but it is clear that he may in equity, the court will appoint a receiver, not disturbing those entitled to previous beneficial interests.^(k)

The court will not appoint a receiver at the suit of an equitable creditor, however clear his claim may be, unless it is satisfied that the property is in danger, or unless there be some other equity upon which to found the application. In a case where a testator had devised his estate to a man for life, without impeachment of waste, "excepting voluntary waste in pulling down houses and not rebuilding the same, or others of equal

^(h) 2 Sw. 132, 2 Wils. Ch. 150. ^(k) Ib. 154.

⁽ⁱ⁾ 2 Wils. Ch. 151.

or greater degree," the tenant for life pulled down the mansion-house with the intention of forthwith building a better one on the site, and was proceeding with all reasonable dispatch to carry such intention into effect. There being no pretence for saying that he was not proceeding to fulfil his obligation, the party entitled to the next vested remainder was held not entitled to have a receiver of the rents appointed, in order to secure the rebuilding of the mansion.(l)

If a subsequent incumbrancer be in possession of the estate, and a prior legal incumbrancer cannot recover at law by ejectment, by reason of some outstanding prior legal estate, a receiver may be appointed.(m) In *White v. Bishop of Peterborough*,(n) a case which occurred between the years 1803 and 1817, when a judgment creditor might take in execution the profits of a rectory, a sequestration creditor had got possession of the profits of the rectory. The sequestration creditor was in fact the third incumbrancer. The first incumbrance was a demise for years to secure an annuity. The second incumbrance was also an annuity secured by a term. The sequestration creditor having got into possession, Lord Eldon, on bill filed by the second incumbrancer, held that he was entitled to a receiver, inasmuch as he could not succeed in ejectment because there was a prior legal estate which might have been set up against him. "Where," said Lord Eldon,(o)

(l) *Micklethwaite v. Micklethwaite*, 1 D. & J. 504.

(n) 3 Sw. 109.

(o) Ib. 116.

(m) *Silver v. Bishop of Norwich*, 3 Sw. 116 n.

“a creditor of a clergyman seeks to obtain payment of his debt by judgment and sequestration, he is, in contemplation of this court, in the same state as any other creditor who has taken out execution, and a creditor having taken out execution cannot hold property against an estate created prior to his debt. If by *elegit* one creditor is in possession of one moiety, and another creditor of another moiety, that is good against the creditor; but if there is an antecedent estate by virtue of which an ejectment may be brought, it does not appear that against that estate the creditors may hold.” So also it was held in *Silver v. Bishop of Norwich*(p) that the grantee of an annuity, or creditor whose charge was secured by being vested in the trustees of a term, was entitled to a receiver as against judgment creditors who have obtained possession under writs of *elgeit* or sequestration, if there is a legal estate prior to the term securing his annuity, which bars him from proceeding at law by ejectment.

The plaintiff should show on the pleadings that there is such an estate as would defeat proceedings in ejectment; if it does not appear on the pleadings that it cannot be sustained, a receiver cannot be appointed.(q)

Receiver Appointed at Suit of Judgment Creditors.—A judgment creditor who has sued out execution on his judgment, but finds himself defeated by a prior title extending to the whole interest of the debtor in the property upon which the judgment is proposed to be

(p) 3 Sw. 112 n.

(q) *Silver v. Bishop of Norwich*, 2 Sw. 116 n.

executed, and so precluded from obtaining execution, or the benefit of an *elegit* or *fi. fa.*, has a right to come to the court for the appointment of a receiver of the proceeds of the estate of the debtor.^(r)¹

(r) *Curling v. Marquis of Townshend*, 19 Ves. 632; *Plaskett v. Lord Dillon*, 2 Bligh, N. S. 239; *Gouthwaite v. Rippon*, 3 Jur. 7, 8 L. J. Ch. N. S. 139; *Hollis v. Bryant*, 6 Jur. 356; *Smith v. Hurst*, 1 Coll. 705, 10 Ha. 48; *Rhodes v. Lord Mostyn*, 17 Jur. 1007; *Partridge v. Foster*, 34 Beav. 1; see *Re Cowbridge Railway Co.*, L. R. 5 Eq. 417. The jurisdiction of the Court of Chancery in Ireland to appoint a receiver upon petition by a judgment creditor was formerly very extensive. 5. & 6 Will. 4, c. 55, ss. 31, 32; and 3 & 4 Vict., c. 105, ss. 21, 23, 24; see Reilly on Petitions. It has, however, been much restricted by more recent legislation; 12 & 13 Vict., c. 95; 13 & 14 Vict., c. 29; 19 & 20 Vict., c. 77, ss. 2, 3. See Reilly on Summ. Petit. 374 *et seq.*

¹ In New York, independently of the provisions in the Revised Statutes, it had been held, in *Hadden v. Spader*, 20 John. 554, that a judgment creditor whose execution had been returned unsatisfied might come into chancery to reach an interest of the debtor in property which could not be sold under the execution at law; see *Farnham v. Campbell*, 10 Paige, C. R. 601; *Suydam v. North Western Ins. Co.*, 51 Penna. St. R. 398; Bispham's Equity, 469 (§ 527). In such cases it is the duty of the complainant to apply for a receiver; *Osborn v. Heyer*, 2 Paige, C. R. 342; and his appointment is almost a matter of course; *Bloodgood v. Clark*, 4 Id. 577; *Corning v. White*, 2 Id. 568; *Bank v. Schermerhorn*, Clarke, 214; *Austin v. Figueira*, 7 Paige, C. R. 56; *Congden v. Lee*, 3 Edw. C. R. 304; *Gregory v. Gregory*, 33 N. Y. 1; but not when there is property which can be seized under a *fi. fa.*, *Parker v. Moore*, 3 Id. 234. In *Sylvester v. Reed*, 3 Edw. C. R. 296, a receiver was refused because the defendant had died *pendente lite*. It was said that under such circumstances the plaintiff ought to come in under the general administration of the decedent's estate. But a different conclusion has recently been reached by the Court of Appeals in *Brown v. Nichols*, 42 New York (3 Hand), 26. This subject in this State is now regulated by statute.

In New Jersey a judgment creditor who has exhausted his remedy

A judgment or other specialty creditor cannot, however, maintain any suit at all till he has taken the steps necessary for acquiring a charge upon the property. He must go up to the point at which he will be met by the obstruction, before he can say that he is embarrassed by it. Till he can do so, he can have no *locus standi* in equity.(s) Before being able to procure relief in equity, the creditor must show by his bill that he has proceeded at law to the extent necessary to give him a complete title. He must show that he has sued out the writ of *fi. fa.* or *elegit*, the execution of which is avoided, or the defendant may demur.(t) A creditor is obliged to sue out the writ, even in the case where the debtor's estate is a mere equity of redemption, and therefore incapable of extension.(u)

If he has sued out an *elegit*, a judgment creditor may have a receiver of the real estate of his debtor appointed without delay.(x) But if no *elegit* has been sued out, and the judgment creditor proceeds under

(s) *Per Christian*, L. J., Ir. L. R. 2 Eq. 542. (x) *Smith v. Hurst*, 1 Coll. 705; *Rhodes v. Lord Mostyn*, 17

(t) Mitf. Plead. 101; *Smith v. Jur.* 1007; *Partridge v. Foster*, *Hurst*, 1 Coll. 705, 10 Ha. 48. 34 Beav. 1.

(u) *Re Cowbridge Railway Co.*, L. R. 5 Eq. 417.

by execution, may proceed in equity against the *choses* in action of his debtor, and have them collected by a receiver. *Tantum v. Green*, 6 C. E. Green, 364. In some cases a receiver may be appointed in proceedings in divorce in aid of a decree for alimony; see *Barker v. Dayton*, 28 Wis. 367. But it seems that such an appointment will not be made in the first instance, but only in the event of the husband failing to give security, or of the surety's default. *Davis v. Davis* 1 Hun, 444.

the statute 1 & 2 Vict., c. 110, a receiver will not be appointed of the real estate of the debtor, unless one year has elapsed from the time of entering up the judgment.(y) By a late act, 27 & 28 Vict., c. 112, s. 1, however, it is declared that no judgment entered up thereafter shall affect any land, until such land shall have been actually delivered in execution by virtue of a writ of *elegit*, and the writ shall have been duly registered, but that the judgment creditor to whom land has been actually delivered in execution, shall be entitled forthwith to have the benefit of his judgment.

If there are prior or outstanding mortgages, but the mortgagees are not in possession, or refuse to take possession, the court will appoint a receiver of the mortgaged premises at the suit of judgment creditors, without prejudice, however, to the rights of the mortgagees to take possession, if they think fit.(z)

As soon as the writ of *fi. fa.* is in the hands of the sheriff, a receiver of the chattels of the debtor will be appointed at the suit of the judgment creditor, if the property is in danger.(a)¹

A judgment creditor under an execution takes all that belongs to the debtor, and nothing more. The judgment operates as a charge upon the beneficial interest of the debtor, and only attaches upon what is at the time it is entered up or afterwards becomes his

(y) *Ib.*

(a) *Smith v. Hurst*, 1 Coll.

(z) *Rhodes v. Mostyn*, 17 Jur. 705; see *Blanchard v. Cawthorne*, 4 Sim. 566.

¹ See *Rose v. Bevan*, 10 Maryl. 466.

property. The creditor takes the property subject to every incumbrance to which it was subject in the hands of the debtor. If the debtor has a legal estate, subject to an equity, the judgment will be a charge upon the estate, subject to the same equity. In the case of an equitable estate, it will be a charge upon the equitable estate. A judgment creditor does not, by giving notice or taking out a stop order, acquire priority over a prior mortgagee or assignee who has not done so.(b)

A judgment creditor may, under the provisions of 27 & 28 Vict., c. 112, s. 4, have an order for the sale of land.(c)

The judgment creditor of a corporation, whose debt originated prior to the Municipal Corporation Act, is entitled to have a receiver over the whole corporate property including lands that may have been acquired since the Act.(d)¹

(b) *Whitworth v. Gaugain*, 3 Ha. 425, 1 Ph. 735; *Abbott v. Stratten*, 3 J. & L. 603; *Anderson v. Kemshead*, 16 Beav. 339; 417.

Ames v. Birkenhead Docks, 20 Beav. 342; *Scott v. Hastings*, 4 K. & J. 633; *Kinderley v. Jervis*, 22 Beav. 1; *Wickham v. New Brunswick, &c., Railway Co.*, L. R. 1 P. C. 64.

(c) See *Re Hull and Hornsea Railway Co.*, L. R. 2 Eq. 262;

Re Bishops Waltham Railway Co., 1b. 2 Ch. App. 382; *Re Cowbridge Railway Co.*, 1b. 5 Eq.

(d) *Arnold v. Mayor, &c., of Gravesend*, 2 K. & J. 574; see S. C., 2 Jur. N. S. 706, as to right of mortgagee, after the Corporation Act, against a receiver appointed at suit of judgment

creditor whose debt originated before the act.

¹ Besides the cases mentioned in the text, in which receivers are appointed at the instance of creditors, the statutes of many States authorize their appointment, under certain circumstances, either for

SECTION VI.—IN THE CASE OF PUBLIC COMPANIES.¹

Receiver of Tolls, &c., Appointed at Suit of Mortgagee.—The ground on which the Court of Chancery will not appoint a receiver at the suit of a mortgagee of real estate who has the legal estate, being that there is open to him a full and perfect remedy at law, (e) the objection to the appointment of a receiver is removed in cases where the mortgagee has not open to him a remedy at law by ejectment. Inasmuch, therefore, as the mortgage by a railway or canal company of their

(e) *Supra*, p. 38.

the purpose of reaching and guarding the debtor's property before judgment, or to preserve it after judgment, or to carry the judgment into effect. Such is the case in Ohio (Scney's Code, Title 8, Chap. 5), Indiana, Kansas (Gen. Stats. 667), Kentucky (Myers's Code of Practice, 95 and 96), California (Wood's Dig. 185), and New York. The cases in which it is proper to appoint these receivers, together with their powers, duties, and responsibilities when appointed, are to a great extent regulated by the various statutes, the provisions of which and the judicial interpretations whereof it would be impossible, even if it were desirable, to notice here in detail. Of course they throw no light upon the subject of the appointment of receivers in equity, independently of legislation. It may be remarked, however, that the practice of Courts of Chancery has been generally followed for the purpose of regulating the conduct of statutory receivers in those cases which are not governed by express legislative provisions. In Pennsylvania, where a petitioner for the benefit of the Insolvent Act has been bound over or committed for trial under the criminal provisions of the Act, a receiver may be appointed. See 1 Purdon Dig. 784.

¹ If the governing body of a company is so divided that it cannot act together, the court will grant an injunction and appoint a receiver, if necessary, until a meeting is held by the company and a proper governing body appointed. *Featherstone v. Cooke*; *Trade Auxiliary Co. v. Vickers*, L. R. 16 Eq. 298.

“undertaking,” or the rates, tolls, and dues arising therefrom, does not give the mortgagee such an interest as will enable him to maintain ejectment,(f) he may come to the court for a receiver.(g)¹

- (f) *Doe v. St. Helen's, &c., Railway Co.*, 2 Q. B. 364. Eq. 534. A railway mortgage-debenture holder is entitled to a receiver of the tolls and the undertaking, and not merely of the profits. The order for the appointment of a receiver should follow the terms of the mortgage deed as to the property in respect of which the appointment is made.
- (g) *Fripp v. Chard Railway Co.*, 11 Ha. 241; *Potts v. Warwick and Birmingham Canal Co.*, Kay, 146; *Ames v. Birkenhead Docks*, 20 Beav. 342; *Bowen v. Brecon Railway Co.*, L. R. 3 Eq. 541; *Gardner v. London, Chatham and Dover Railway Co.*, Ib. 2 Ch. App. 201; *Hopkins v. Worcester and Birmingham Railway Co.*, Ib. 6 Eq. 447; see *Imperial and Mercantile Credit Association v. Newry and Armagh Railway Co.*, Ir. L. R. 2 L. T. N. S. 345. *Griffin v. Bishops Castle Railway Co.*, 15 W. R. 1058; see *Fripp v. Chard Railway Co.*, 11 Ha. 241, Set. on Decr. 1034. See as to form of order, *Griffin v. Bishops Castle Railway Co.*, 16 L. T. N. S. 345.

¹ Courts of Equity in this country have exercised the jurisdiction of chancery in the appointment of receivers of public companies. In the case of *The Covington Drawbridge Company v. Shepherd*, 21 Howard, 125, it was decided that the United States Courts had power to appoint a receiver of the tolls of a drawbridge company at the instance of an execution creditor who had levied upon the rents and profits of the bridge, purchased the same at the marshal's sale, demanded possession of the bridge for the purpose of collecting the tolls, and had been refused. The like power was exercised in *The State v. The Northern Central Railway Co.*, 18 Maryl. 193. See also *Ogilvie v. The Knox Ins. Co.*, 22 Howard, 380; and *White Water Valley Canal Co. v. Vallette*, 21 Howard, 414.

In *Kennedy v. The St. Paul & Pacific R. R. Co.*, 2 Dillon, 448, a receiver of a railroad company was appointed for the purpose of preserving a valuable land grant which would have been otherwise lost to the corporation; and to that end the receiver was authorized to borrow money to complete the unfinished portions of the road, and

So, also, and upon the same principle, a man who has sold land to a railway company in consideration of a rent-charge, may come to the court for a receiver.^(h) So, also, and upon the same principle, a mortgagee of turnpike,⁽ⁱ⁾ dock,^(j) and market^(k) tolls has a right to come to the court to have a receiver appointed.

The court has jurisdiction to appoint a receiver at the suit of a mortgagee of tolls, independently of any Act of Parliament.^(l) The appointment of a receiver at the suit of a mortgagee of tolls is one of the oldest remedies of the court.^(m) It is not necessary that the Act should give the court power to appoint a receiver to enable the court to do so. When an Act of Parliament authorizes a mortgage, it authorizes, as incident to it, all necessary remedies to compel payment, and in the case of tolls a power to appoint a receiver.⁽ⁿ⁾

(h) *Eyton v. Denbigh, &c.*, (k) *De Winton v. Mayor of Railway Co.*, L. R. 6 Eq. 14. *Brecon*, 26 Beav. 533.

(i) *Knapp v. Williams*, 4 Ves. (l) *Ib.*
430 n., per Lord Loughborough; (m) *Hopkins v. Worcester and Lord Crewe v. Edleston*, 1 D & *Birmingham Canal Co.*, L. R. 6 J. 109. Eq. 447.

(j) *Ames v. Birkenhead Docks*, (n) *De Winton v. Mayor of Brecon*, 26 Beav. 541.

to issue debentures which were made (by the terms of the order) a lien on the corporate property.

Where a fund belonging to a foreign corporation is deposited with parties within the jurisdiction, a receiver of that fund will be appointed on a proper case being made out. *Redmond v. Hoge*, 3 Hun, 171.

In many States there are statutory provisions authorizing the appointment of receivers of public companies, under certain circumstances, and regulating their duties and authority. See *infra*, page 80, note.

The fact that a precise and specific remedy may be pointed out by the Act of Incorporation, which provides that persons aggrieved by any order of the managers of the corporate body may appeal to the quarter sessions, does not deprive a party of his right to a receiver; nor does a proviso in the Act of Incorporation, that no suit should be commenced against any person for anything done in pursuance of the Act, until a certain notice had been given, apply to a suit for a receiver; (o) nor does a proviso in the Act of Incorporation of a railway company, that a committee of twelve of the proprietors of the company should be elected at every annual meeting to manage the affairs of the company, deprive a mortgagee of his right to a receiver of the rates, tolls, and dues of the company. (p) Nor is the jurisdiction to appoint a receiver at the suit of a mortgagee taken away by the fact that there is a provision by statute for the appointment of a receiver through the medium of two justices of the peace. (q) Nor is it any objection to the appointment of a receiver, that the company has duties to perform, the neglect of which might subject them to indictment, for the order of the court always gives the parties liberty to apply, whereby such consequences may be averted. (r)

(o) *Drewry v. Barnes*, 3 Russ. 104.

(p) *Fripp v. Chard Railway Co.*, 11 Ha. 241.

(q) *Ib.* 259. By the Lands Clauses Act, 8 & 9 Vict., c. 26, ss. 53, 54, provision is made for the

appointment of a receiver at the suit of mortgagees by two justices of the peace. A provision to the same effect is contained in 10 & 11 Vict., c. 16, ss. 86, 87.

(r) *Fripp v. Chard Railway Co.*, 11 Ha. 259.

Pleading.—A mortgagee of the tolls of a company, seeking to obtain the appointment of a receiver, must sue on behalf of himself and all other mortgagees who have an interest identical with his own, or are in the same class with himself.^(s)¹ Where such a suit has been instituted, a mortgagee holding a mortgage in the statutory form of a debenture of the company is not entitled to sue out execution on a judgment which he has obtained at law in an action on the same instrument, except as a trustee for himself and all other debenture holders entitled to be paid *pari passu* with him;^(t) and, that being the opinion of the court, an inquiry was directed upon the petition for leave to issue execution, and in the suit whether it would be for the benefit of the debenture holders that any proceedings should be taken by the receiver for the purpose of making such judgment available for the benefit of such creditors.^(u)

(s) *Potts v. Warwick and Birmingham Canal Co.*, Kay, 142; (t) *Bowen v. Brecon Railway Co.*, L. R. 3 Eq. 541.
Fripp v. Chard Railway Co., 11 (u) *Ib.* 551.
 Ha. 241; *Legg v. Matthieson*, 2 Giff. 71.

¹ In *Gravenstine's Appeal*, 49 Penna. St. R. 310, a creditor of a corporation filed a bill to restrain another creditor, who had obtained judgment, from issuing execution and levying upon the corporate property. The court below granted an injunction and appointed a receiver, but this decree was reversed by the Supreme Court, partly upon the ground that the court would not interfere on behalf of one creditor to restrain another from obtaining satisfaction by means of a prior levy upon the debtor's goods, and partly also because the corporation was not made a party to the bill, and the appointment of a receiver of the corporate property was therefore highly irregular. And see *Ellieott v. United States Insurance Co.*, 7 Gill, 307.

In a case where a mortgagee of turnpike tolls, under an Act of Parliament which provided that there should be no priority among the mortgagees, took possession on not being paid, and retained the whole proceeds in discharge of his own demand, a receiver was appointed.(v)

A receiver may be appointed in a suit instituted by one of several mortgagees on behalf of himself and all others, though the others do not concur in the application.(x)

Provisions inserted in the Order.—The court will not, at the suit of mortgagees, sanction the appointment of a receiver of a public company, established by the legislature for a particular object, without providing as far as possible for the future working and continuance of the undertaking sanctioned by the legislature.(y) The order will also be without prejudice to the rights of prior incumbrancers.

Receiver of Chattels of a Railway Company.—The Court of Chancery has, even after a receiver of the tolls has been appointed, appointed a receiver of the chattel property of a railway company, on a motion by a debenture holder, when the company had by a

(v) *Dumville v. Ashbrooke*, 3 Co., Kay, 147; *Ames v. Birkenhead Docks*, 20 Beav. 350; see as

(x) *Fripp v. Chard Railway* to form of the order, *Fripp v. Co.*, 11 Ha. 241. *Chard Railway*, 11 Ha. 265, Set.

(y) *Fripp v. Chard Railway* on Decr. 1034; *Potts v. Warwick and Birmingham Canal Co.*, 11 Ha. 265; *Potts v. Warwick and Birmingham Canal* Kay, 143.

deed assigned their rolling stock and chattels to trustees for the general benefit of creditors.(z)

Judgment Creditor of a Company may have a Receiver.—An ordinary judgment creditor of a railway or canal company, suing out his *elegit* and getting extended under it the land traversed by the railway, has a right, as between himself and the company, to go into possession of the land, and, not interfering with the working of the canal or railway, to take the profits realized by its use in the only way in which the responsibilities imposed by the legislature on such companies for the benefit of the public allow them to use it, and in the assertion of that right to have the protection of a Court of Equity, by the appointment of a receiver of the tolls and traffic receipts.(a)

Priorities between Mortgagee and Judgment Creditor.—As between a judgment creditor and a mortgagee of the undertaking, who had obtained his mortgage before the recovery of the judgment, the right of the mortgagee is paramount.(b) When, accordingly, a receiver has been appointed at the instance of a mortgagee, his right is prior to the claim of a judgment creditor under an *elegit*, whose whole interest in the land can be that

(z) *Waterloo v. Sharp*, 2 W. Mercantile Credit Association N. 64; see *Rickman v. Johns*, L. v. Newry and Armagh Railway R. 6 Eq. 488, 17 W. R. 928. Co., &c., Ir. L. R. Eq. 531, per Christian, L. J.

(a) *Furness v. Caterham Railway Co.*, 25 Beav. 614; *Potts v. Warwick and Birmingham Canal Co.*, Kay, 145; *Imperial* (b) *Legg v. Matthieson*, 2 Giff. 71; *Wildy v. North Hants Railway Co.*, 3 W. N. 61; *supra*, p. 65.

only which subsists subject to the right of the receiver and the provisions of the railway acts. Notwithstanding that a receiver may have been appointed at the instance of a mortgagee, a judgment creditor may also have a receiver appointed; but the receiver who has been appointed at the instance of a judgment creditor takes without prejudice to the right of a receiver appointed at the instance of a mortgagee.(c) The fact that judgment may have been obtained before the appointment of a receiver at the instance of the mortgagee, does not vary the rule. If the mortgagee is not in possession by his receiver at the time when execution is issued, the judgment creditor may, under the provisions of the Common Law Procedure Act, take the rates and tolls then due; but as to the rates and tolls thereafter to become due, he will be stopped at any time by the mortgagee entering into possession by his receiver.(d)

So also when a judgment creditor applied for a receiver against a company which had concluded an agreement with another company to work their line,

(c) *Potts v. Warwick and Birmingham Canal Co.*, Kay, 145; *Ames v. Birkenhead Docks*, 20 Beav. 332; see *Hopkins v. Worcester and Birmingham Canal Co.*, L. R. 6 Eq. 447. In a case where a judgment creditor under an *elegit* was in possession, and a receiver was afterwards appointed at the suit of a mortgagee, it was ordered that notice of the order should be given to the judgment creditor, and that he should be at liberty, though not a party to the cause, to appear at the hearing of the motion, or to give such notice of motion to discharge or vary the order as he may be advised. *De Winton v. Mayor, &c., of Brecon*, 26 Beav. 539.

(d) *Ames v. Birkenhead Docks*, 20 Beav. 352.

a receiver was appointed without prejudice to the working agreement.(e)

In determining their respective rights between a mortgagee of a railway, canal, or other undertaking and a judgment creditor, it is necessary to bear in mind that the effect of a mortgage of the undertaking and tolls is to carry the tolls, the unpaid calls, and probably all the property of the company, as proprietors of the undertaking, which any one is at liberty to use on paying toll, but not the stock or chattels of the company, as carriers of passengers or goods for hire, or the soil of the undertaking itself.(f) A mortgage of an undertaking, within the terms of the Companies Clauses Act, carries only the tolls and sums of money arising or authorized to be received by virtue of the Act, *i. e.*, the profits arising from the use of the undertaking as a going concern.(g) The mortgage of an undertaking does not carry with it the lands of the company, unless it appear from the deed or act that it was the intention of the parties that the land should pass. The mortgage debentures of a railway or other company do not constitute an equitable charge on the lands of the company, so as to give the holders a right to restrain the sale of the lands by judgment creditors, or

(e) *Contract Corporation v. Eastern Union Railway Co. v. Hart, Tottenham and Hampstead* 8 Exch. 116.

Junction Railway Co., 2 W. N. 242.

(f) *Hart v. Eastern Union Railway Co.*, 7 Exch. 265; *East-*

(g) *Gardner v. London, Chatham and Dover Railway Co.*, L. R. 2 Ch. App. 201; *Bowen v. Brecon Railway Co.*, L. R. 3 Eq. 548.

any title to the proceeds of the land when sold.^(h) Where, accordingly, a railway company, within the term of the Companies Clauses Act, being indebted in a sum of money to their contractors for work done, had granted to them as a security for the debt a charge upon their surplus land, it was held that the mortgagees of the undertaking had no charge upon such lands, but that the contractors or their assignees were entitled to have a receiver appointed.⁽ⁱ⁾ So also it was held that the mortgagee of the tolls of an undertaking cannot have an injunction and receiver against judgment creditors who are about to take under an *elegit* the lands of the company.^(k) The mortgage of a railway undertaking includes, it would seem, the interest of the company in the works, rails, and fixtures, as incident to the working of the railway.^(l) A judgment creditor has been restrained, at the suit of a mortgagee, from taking under his *elegit* the works, rails, &c. &c., as incident to the working of the railway.^(m)

Right of Judgment Creditor to the Chattels of a Company.—Under an *elegit* it seems that the chattels and rolling stock of a railway company could, in cases not coming within the Railway Companies Act, 1867, be

^(h) *Wickham v. New Brunswick, &c., Railway Co.*, L. R. 1 P. C. 64.

⁽ⁱ⁾ *Gardner v. London, Chatham and Dover Railway Co.*, L. R. 2 Ch. App. 201.

^(k) *Perkins v. Deptford Pier Co.*, 13 Sim. 277.

^(l) *Legg v. Matthieson*, 2 Giff. 71; see *Gardner v. London, Chatham and Dover Railway Co.*, L. R. 2 Ch. App. 201.

^(m) *Legg v. Matthieson*, 2 Giff. 71.

seized by the judgment creditor.⁽ⁿ⁾ But now, under the 4th section of the Railway Companies Act, 1867, 30 & 31 Vic., c. 127, the plant and rolling stock of a railway company may not be taken in execution before the first day of September, 1870,^(o) where the judgment on which execution issues is recovered in an action on a contract entered into after the passing of the Act, or in an action not on a contract commenced after the passing of the Act; but the person who has recovered any such judgment may obtain the appointment of a receiver, and, if necessary, of a manager of the undertaking of the company, on application by petition in a summary way to the Court of Chancery; and all money received by such receiver or manager shall, after due provision for the working expenses of the railway, and other outgoings in respect of the undertaking, be applied and distributed under the direction of the court in payment of the debts of the company, and otherwise according to the rights and priorities of the persons for the time being interested therein, and on payment of the amount due to every such judgment creditor as aforesaid, the court may, if it think fit, discharge such receiver or manager.

Right of Judgment Creditor to have a Sale.—The appointment of a receiver is the only remedy open to the holders of mortgage debentures of a railway; the

⁽ⁿ⁾ *Russell v. East Anglian* L. R. 3 Eq. 548; see *Blackmore Railway Co.*, 3 Mac. & G. 125; *v. Yates*, 1b. 2 Exch. 225.
Bowen v. Brecon Railway Co., ^(o) See 31 & 32 Vict., c. 79.

right to foreclosure or sale is denied to them ;(*p*) but a judgment creditor of a railway company may, under the provisions of 27 & 28 Vict., c. 112, s. 4, have an order for the sale of the railway.(*q*)

Statutory Bondholder as Distinguished from a Mortgagee.—The position of a statutory bond or debenture holder of a company, under the Companies Clauses Act, or other act, must be carefully distinguished from the position of a mortgagee. A statutory bond or debenture holder is not entitled to an equitable charge on the tolls and traffic receipts of the undertaking, or to have a receiver appointed over such tolls and receipts, for the purpose of paying his claim.(*r*)¹ In *Russell v. East Anglian Railway Co.*,(*s*) where a receiver had been appointed by consent at the suit of a bondholder of a railway company, Lord Truro held that the order for a receiver ought not to have been made, and permitted the execution creditor to levy under his writ of *fi. fa.* against the goods of the company, notwithstanding the possession of the receiver ;(*t*) and there can be no doubt that if the judgment creditor had in that case asked leave to issue an *elegit* against

(*p*) *Furness v. Caterham* L. R. 2 Eq. 524; see *Bowen v. Railway Co.*, 25 Beav. 614. *Brecon Railway Co.*, L. R. 3

(*q*) *Supra*, p. 65. Eq. 548, *per* Lord Hatherley.

(*r*) *Imperial Mercantile Credit Association v. Newry and* (*s*) 3 Mac. & G. 151.

Armagh Railway Co., &c., Ir. (*t*) See *Bowen v. Brecon Railway*, L. R. 3 Eq. 548.

¹ See *Preston v. Corporation of Great Yarmouth*, L. R. 7 Ch. App. 655.

the land of the railway, as well as a *fi. fa.*, the reasoning on which he was held entitled to the one would as well entitle him to the other.(u)

Receiver Appointed at Suit of Statutory Bondholder.—

A statutory bond or debenture holder who has obtained judgment and execution against the company, may, on behalf of himself and all other bondholders, file a bill for a receiver;(v) but he is not bound to bring a suit on behalf of himself and all the others.

A statutory bond or debenture holder who has recovered judgment and execution against the company, is not a trustee of the moneys he may recover under the execution for himself and all other debenture holders. If he gets paid under his execution by the company before any of the other bondholders intervene or come into competition with him, he may keep what he has got, and cannot be brought back again.(x) The proper mode of giving effect to the non-priority clauses between bondholders in the Companies Clauses Act, would seem to be to let it operate after the bondholders come into competition with each other, but not to the undoing of past transactions. The priority spoken of in the 44th section of the act is not priority existing by the bond, but priority to be acquired by

(u) *Imperial Mercantile Credit Association v. Newry and Armagh Railway, &c.*, Ir. L. R. 2 Eq. 526, per Christian, L. J.
Armagh Railway, &c., Ir. L. R. (x) *Ib.* 543; see *Fountain v. Carmarthen Railway Co.*, L. R. 2 Eq. 539, per Christian, L. J.
 (v) *Imperial Mercantile Credit Association v. Newry and* 5 Eq. 324, per Lord Hatherley.

execution; priority not between bonds which are no charges at all, but between executions.(y)

Before a statutory bond or debenture holder can maintain a suit in equity against the company, he must have proceeded at law to the extent necessary to give him a complete title. Till he has sued out the writ of *fi. fa.* or *elegit*, he has no *locus standi* in equity.(z)

Under Companies Clauses Act Mortgagees cannot have Priority as against each other.—The 42d section of the Companies Clauses Act limits and diminishes the intrinsic rights of mortgagees, imposing on them the principle of non-priority.(a) After a bill has been filed by all the holders of mortgage debentures, and a receiver has been appointed, a single mortgage debenture holder, who has recovered judgment against the company on his debenture, is not entitled to sue out execution on his judgment otherwise than as a trustee for himself and the other mortgage debenture holders.(b) The intent of the Act being that parity of possession shall be given to those who have parity of security, a mortgage debenture holder is not entitled, as soon as he can recover judgment, to acquire an advantage over the other mortgage debenture holders.(c) In a case where a receiver had been appointed in a suit instituted on behalf of all the mortgage debenture holders of a company, and judgment was afterwards recovered against the company by one of the

(y) Ir. L. R. 2 Eq. 543, *per* Christian, L. J.

(b) *Bowen v. Brecon Railway Co.*, L. R. 3 Eq. 541.

(z) Ib. 542, *per* Christian, L. J.

(c) Ib. 550.

(a) Ir. L. R. 2 Eq. 534, *per* Christian, L. J.

mortgage debenture holders, inquiry was directed whether it would be for the benefit of the debenture holders that any proceedings should be taken by the receiver for the purpose of making the judgment available for them.^(d)

Priority of Mortgagees and Bondholders under 30 & 31 Vict., c. 127.—The priority of mortgagees and bond and debenture stock holders of a railway company against the company, and the property from time to time of the company, over all other claims, on account of any debts incurred or engagements entered into after August, 1867, has been declared by 30 & 31 Vict., c. 127, s. 23 ; which, however, provides that this priority shall not affect any claim against the company in respect of any rent-charge granted or to be granted in pursuance of the Lands Clauses Consolidation Acts, 1845 and 1860 ; or in respect of any rent or sum reserved by or payable under any lease granted or made to the company by any person in pursuance of any act relating to the company, which is entitled to rank in priority to, or *pari passu* with, the interest on the mortgages, bonds, or debenture stock.¹

(d) *Ib.* 551.

¹ The exact grounds of the jurisdiction of Courts of Equity over corporations are, perhaps, rather difficult to define. It has been a question which has been somewhat discussed and as to which there seems to have been some difference of opinion whether there was any general equity jurisdiction over corporations, as such, or whether the jurisdiction of Courts of Chancery attached only by virtue of such recognized heads of jurisdiction as trusts, injunctions and the like. This question was elaborately examined by Chancellor Kent in *Att.*

SECTION VII.—IN CASES BETWEEN VENDOR AND PURCHASER.

The court will, upon a proper case being made out, interfere upon motion and appoint a receiver, in cases

Gen. v. Utica Ins. Co., 2 Johns. Ch. 371, and the conclusion reached that in the absence of a case of breach of trust or for an injunction, there was no general equity jurisdiction over corporations. See, also, *The Att. Gen. v. The Bank of Niagara*, Hopkins R. 354; and *Bangs v. McIntosh*, 23 Barb. 591. On the other hand, in Pennsylvania a rather more extended view of the jurisdiction of Courts of Equity over corporations seems to be entertained. See *Commonwealth v. Bank of Pennsylvania*, 3 Watts & Serg. 184-193; *Baptist Church v. Scannel*, 3 Grants' Cases, 48; *Sawn v. Gesser*, 1 Weekly Notes, 55. And the same conclusion seems to have been reached in Wisconsin; *Adler v. Milwaukee Patent Brick Manuf. Co.*, 13 Wis. 57. But whatever is the true view, one thing seems to be tolerably well settled, that (independently of statutory jurisdiction), a court will not entertain a bill for the dissolution of a corporation and the consequent appointment of a receiver. See *Waterbury v. Merchants' Union Express Co.*, 50 Barb. 157. In other words, a Court of Chancery will not assume jurisdiction to appoint a receiver merely for the purpose of carrying out a decree for dissolution; for it has no jurisdiction to decree the dissolution. Independently of statutory enactments, therefore, Courts of Equity will appoint a receiver over corporate property in the following cases:—

1. At the suit of mortgagees or of bondholders who have a lien on the corporate property. The appointment of receivers in such cases is very frequent, and has been, most generally, exercised in suits to foreclose mortgages of railways. To such actions, the general principles as to the appointment of receivers at the suit of mortgagees, already stated in this chapter, are applicable. See *Keep v. Michigan Lake Shore R. R. Co.*, 6 Chicago Leg. News, 101. Also *Milwaukee Railroad Co. v. Soutter*, 2 Wallace, 501; *Pullan v. Cincinnati and Chicago R. R. Co.*, 4 Bissell, 35; *Williamson v. New Albany, &c., R. R. Co.*, 1 Bissell, 198; *State of Maryland v. Northern Central R. R. Co.*, 18 Maryl. 193; *Bill v. The New Albany, &c., R. R. Co.*, 2 Bissell, 390.

2. At the suit of creditors who have obtained judgment which they are unable to collect by levy under a common law execution.

between vendor and purchaser. In a case, accordingly, where, on a bill impeaching a sale of land on the ground

This is simply the application of the principles, already discussed in this chapter, which regulate the appointment of receivers as between debtor and creditor. *Adler v. Milwaukee Patent Brick Manufac. Co.*, 13 Wis. 57; *Covington Drawbridge Co. v. Shepherd*, 21 How. 112.

3. At the suit of any one (creditor or stockholder) interested in the funds of a moneyed corporation, where there is a breach of duty on the part of the directors and a loss or threatened loss of funds; *Evans v. Coventry*, 5 DeG. M. & G. 911; *Redmund v. Enfield Manufac. Co.*, 13 Abb. Pr. R. (N. S.), 332; or a state of things exists in which the governing body are so divided that they cannot act together; *Featherstone v. Cooke*, L. R., 16 Eq. 301; *Trade Auxiliary Co. v. Vickers*, Id. 303; or where a corporation has practically closed its business; *Warren v. Fake*, 49 How. Pr. R. 430. But ordinarily a stockholder cannot have a receiver upon a preliminary application, for such an order would work a dissolution of the company. The question was considered in *Howe v. Deuel*, 43 Barb. 507, where Ingraham, P. J., used the following language: "It only remains to inquire whether the court, under its general powers as a Court of Equity, can make the order appealed from. . . . That the court has power to restrain a corporation, or its trustees or directors, by injunction from doing any act in violation of its charter or in misapplying the funds of the corporation, I have no doubt; but it must be against such specific acts, and not to enjoin them from carrying on the legitimate business of the corporation. Nor can I doubt the power of the court, in like manner, to restrain trustees or directors from fraudulent dispositions of corporate property or a misapplication of the funds (*Robinson v. Smith*, 3 Paige, 222; *Munt v. The Shrewsbury and Chester R. R. Co.*, 3 Eng. Law and Eq. 144). Various cases may be found cited in Hoffman's Pr. Reps. (pp. 267, 268) to the same effect. But I have been unable to find any cases where, except in regard to moneyed corporations or insolvent corporations, a stockholder may have a receiver appointed on a preliminary injunction, with authority to take entire possession of the corporation and thereby work its dissolution. It is said in this case the plaintiff asks for such dissolution. This is so in the complaint; but such an application can only be made by the Attorney General (Code, § 430; *Smith v. Metropolitan Gas Light Co.*, 12 How. Pr. Rep. 187); or by the parties specified in section 35 of the revised statutes above

of fraud, and alleging gross inadequacy of consideration and undue influence taken of the ignorance of the

referred to." See also *Gilman v. Green Point Sugar Co.*, 4 Lans. 482; and *Turgeon v. Brady*, 24 Louisiana Ann. 348.

4. Where a corporation is dissolved and has no officer to attend to its affairs. The cases of the Accessory Transit Company may be usefully referred to in this connection. In the first place, it was held that when a foreign corporation has been dissolved by a decree of a foreign government, but the decree of dissolution is not absolute, a receiver will not be appointed. And even if such a decree were unqualified, and, although made in the absence of the corporate officers, should be recognized as valid, yet if by its terms the title to the corporate property passed to certain commissioners, a stockholder, having thus been deprived of his title, has no standing to ask for a receiver. *Hamilton v. Transit Co.*, 26 Barb. 46. But a receiver of the company was subsequently appointed at the suit of judgment creditors, and in an action brought by him against the president of the company his title was sustained; *Murray v. Vanderbilt*, 39 Barb. 140. The court said: "But for the purpose of preserving the property for the benefit of creditors or stockholders, I think a Court of Equity has ample power to take charge of it and appoint a receiver. This undoubtedly is the rule in regard to domestic corporations, independent of any statutory provisions." Such was the case in *Lawrence v. The Greenwich Fire Insurance Co.*, 1 Paige, 587. There the bill alleged that the corporation was dissolved, and had no officers to attend to its concerns. The chancellor said: "It was evident there was no person authorized to take charge of, or to conduct the affairs of the corporation. Under these circumstances it was proper to appoint a receiver to take charge of the effects of the company and preserve them for the benefit of the stockholders generally. The amendment of the 244th section of the Code, applying the appointment of receivers to like cases of foreign corporations with those which existed in the case of other corporations, would extend this power to the present case, if any doubt existed prior thereto." It seems that an insolvent corporation cannot, itself, apply for the appointment of a receiver; *Hugh v. McRae*, Chase's Dec. 466.

The general equity jurisdiction, indicated above, has in many States been extended by statute. Such is the case in New Jersey—Nixon's Dig. 406 and 539; and see *Parsons v. The Manufacturing Co.*, 3 Green, C. R. 187; *Brundred v. The Paterson Machine Co.*, 3 Green, C. R. 294; *Oakley v. The Bank*, 1 Green, C. R.

vendor, the court was of opinion, from the materials before it, that it was hardly possible the transaction could stand at the hearing, a receiver was appointed in a suit instituted against the devisees of the party

173; *Hager v. Stephens*, 2 Halst. C. R. 374; *Receivers v. The Paterson Gas Light Co.*, 3 Zabriskie, 292; *Kelley v. Neshanic Mining Co.*, 3 Halst. C. R. 579; *Corrigun v. The Trenton Del. Falls Co.*, Id. 489; *Nichols v. The Perry Patent Arm Co.*, 3 Stock. C. R. 126; *The American Co. v. The Paterson Co.*, 7 C. E. Green, 72; *In re Long Branch and Sea Shore R. R. Co.*, 9 C. E. Green, 398, 11 Id. 539; and *Middleton v. N. J. West Line R. R. Co.*, 10 Id. 306; New York—Rev. Stats. vol. iii. p. 739 *et seq.*; and see *Galwey v. The United States Refining Co.*, 36 Barb. 256; *Bell v. Shibley*, 33 Barb. 614; *Belmont v. The Erie R. R. Co.*, 52 Barb. 637; *Att. Gen. v. The Bank of Columbia*, 1 Paige C. R. 511; *Lawrence v. The Greenwich Fire Insurance Co.*, 1 Paige, C. R. 587; *Bank Commissioners v. The Bank of Buffalo*, 6 Paige, C. R. 497; *Morgan v. The Railroad Co.*, 10 Id. 290; *Ward v. The Sea Ins. Co.*, 7 Id. 294; and *Clinch v. The Southside Railroad Co.*, 1 Hun, 636; Pennsylvania—Purdon Dig. 120–122; Id. Supplement, 1980, 2026; Maine—Rev. Stats. ch. 47, § 61–86; and see *Hewitt v. Adams*, 54 Maine 206; Ohio—Seney's Code, Title 8, Ch. 5; Saylor's Stats. 269, 1304–5; Rhode Island—Rev. Stats. 299, 300, 309, 310; Massachusetts—Gen. Stats. 388–389; Vermont—Rev. Stats. 383; Michigan—Comp. Laws, 1296, 1301, 1302; and see *Fay v. The Bank*, Harrington, C. R. 194; Minnesota—Stats. 335; Alabama—Rev. Code, §§ 730, 731, 1417–1439, 3441, 4422; California—Civil Procedure, Chap. V.; Connecticut—Rev. Stats. 288, 293, 309, 458, 482. The Act of Congress, also, creating the system of National Banks, provides for the appointment of receivers of these institutions by the controller of the currency whenever they are in default in the payment of their notes of circulation. Brightly's Dig. 1125. The decision of a receiver appointed under this Act, upon a claim against the bank, is not conclusive; *Bank of Bethel v. Puhquoque Bank*, 14 Wall. 383, S. C. 36 Conn. 325. As to the effect of appointing a receiver under the act of Congress—see the same case, and also *National Bank v. Colby*, 21 Wal. 609. The provisions of the act do not oust the jurisdiction of the courts to appoint a receiver under an ordinary creditor's bill; *Wright v. The Merchants' National Bank*, 3 Cent. Law J. 351.

charged with fraud.(e) So, also, where it appeared that the defendants had obtained the conveyance of the legal estate from the plaintiff upon a strong suspicion of abused confidence, a receiver was appointed.(f)

In *George v. Evans*,(g) where a bill was filed by a *cestui que trust* to set aside a purchase by a trustee from him, the motion for the appointment of a receiver was refused, though the trustees admitted the purchase of the trust property; the ground of the decision being, though the case was one of suspicion, that the court could not interfere till the purchase-deed was actually set aside, no clear evidence having been given to show that the property was likely to perish from the neglect or misconduct of the defendant.

If a fair *primâ facie* case for the specific performance of a contract be made to appear, the court may interfere upon motion and appoint a receiver.(h) In a case, accordingly, where the bill alleged that the defendant had taken possession, that he was insolvent, and had attempted to sell and convey the estate, a receiver was appointed.(i)¹ So also where an agreement was entered into by the defendant for the sale of an estate to A., the purchase to be completed and the purchase-moneys

(e) *Stillwell v. Wilkins*, Jac. 282.

(h) See *Kennedy v. Lee*, 3 Mer. 448; *McCloud v. Phelps*, 2

(f) *Huguenin v. Basley*, 13 Ves. 107.

Jur. 962.

(g) 4 Y. & C. 211.

(i) *Hall v. Jenkinson*, 2 V. & B. 125.

¹ But the court will not appoint a receiver, solely on the ground that a purchaser is insolvent. *Jordan v. Beal*, 51 Georgia, 602.

to be paid on or before the expiration of five years, and in the mean time interest to be paid half yearly by A., with power to the defendant to avoid the contract in the event of the interest being in arrear for twenty-one days; and the defendant afterwards virtually agreed with the plaintiff, who had advanced moneys to A. to enable him to pay arrears of interest, to extend the term for payment of the half-yearly interest, but notwithstanding the agreement re-entered as for a forfeiture, the court, upon a bill for a specific performance, appointed a receiver.^(k) So also a receiver was appointed on motion of the vendor, pending a reference to the Master as to title in a suit for the specific performance of a contract for the sale of an estate, which consisted of buildings and offices, on which it would be necessary to effect insurances, and of ornamental grounds which required considerable expenditure and attention.^(l) So also a receiver may be appointed against a purchaser in possession who deals with the land in a manner contrary to former usage, or to the usual course of husbandry, at the suit of the vendor and before specific performance.^(m) So also where, pending a suit instituted by a married woman against her husband, praying the execution of a post-nuptial settlement and for an injunction to restrain him from selling or encumbering, the husband sold the estate, comprised in the settlement, to the plain-

(k) *Dawson v. Yates*, 1 Beav. 301.

(m) *Osborne v. Harvey*, 1 Y. & C. C. C. 116.

(l) *Boehm v. Wood*, 2 J. & W. 236.

tiffs, for valuable consideration, and the plaintiffs thereupon filed a bill alleging that the settlement was void against them as being voluntary, and charging that the defendant was taking advantage of the legal estate to prevent the purchaser proceeding at law, and praying, amongst other things, a receiver, the court, being satisfied, upon the pleadings, that the decree would be in favor of the plaintiffs, and that the contract would be enforced, granted the motion for a receiver.⁽ⁿ⁾

In a case where a purchaser was discharged on a report that a good title could not be made out, and there was no fund in court to pay him his interest and costs, a receiver was appointed over the lands, with directions to apply the rents in discharge of his interest and costs.^(o)

SECTION VIII.—IN CASES BETWEEN COVENANTOR AND COVENANTEE.

The court will interfere in cases between covenantor and covenantee, and appoint a receiver, where a fair *primâ facie* case is made out for the specific performance of the covenant. In a case, for instance, where a tenant in tail in remainder, upon an advance of money to him by the plaintiff, had agreed to repay it after the death or failure of issue of his brother, the tenant in tail in possession, and had secured the money by a mortgage of the estate, and covenanted to levy a fine

⁽ⁿ⁾ *Metcalf v. Pulvertoft*, 1 V. & B. 181.

^(o) *Hill v. Kirwan*, 1 Hog. 175.

and suffer a recovery to give effect to the mortgage, but on coming into possession refused to perform his covenant, the court, on bill for specific performance, appointed a receiver of the rents.(p) So also where the defendant, on an advance of money being made to him, agreed to execute a mortgage of certain lands, but afterwards refused to perform his agreement, and there was an arrear of interest due on the money advanced, on bill for specific performance, the motion for a receiver was granted.(q) So also where, in a case which took place between the years 1811 and 1817, when the incumbent of a benefice might charge his benefice, an incumbent duly charged his benefice with an annuity, and covenanted that if he should afterwards be preferred to any other benefice he would charge the same with an annuity to the same amount; but afterwards, on being preferred to another benefice, refused to fulfil his covenant, the court held that the covenant constituted a good equitable charge, which attached on the new benefice, and granted a receiver.(r)

The court will interfere, when necessary, to prevent irreparable mischief from breach of covenant, although the property may have to be distributed in bankruptcy, and though the Court of Bankruptcy may be able to give the same relief.(s) Where, accordingly, inspectors appointed by a deed of inspectorship, registered under the Bankruptcy Act, 1861, filed a bill against the

(p) *Free v. Hindle*, 2 Sim. 7.

(q) *Shakel v. Duke of Marlborough*, 4 Madd. 463.

(r) *Metcalf v. Archbishop of York*, 6 Sim. 225; 1 M. & C. 553.

(s) *Riches v. Owen*, L. R. 3 Ch. App. 821.

debtor, alleging that he was dealing with his assets in a manner contrary to the covenants of the deed, that they were unable to prevent his proceedings, and that irreparable mischief would result from them, a receiver was appointed.(t)

SECTION IX.—BETWEEN TENANT FOR LIFE AND
REMAINDERMAN.

If the tenant for life does not keep down the interest of mortgages, and other incumbrances on the estate, the remainderman may apply to have a receiver appointed, with power to keep down the interest, and remit to the tenant for life the surplus rents.(u)¹

Where there was a limitation of a term to raise portions for younger children, and afterwards the estate was limited to A. B. for life, with remainder over, and a decree had been made to sell the term for raising portions, and A. B., the tenant for life, would not produce the title deeds, so that it was impossible to make out a title, and proceed to a sale, an order was made for a receiver of the rents and profits of the estate.(x)

(t) *Riches v. Owen*, L. R., 3 566; *Powys v. Blagrove*, Kay, Ch. App. 821. 495; *Shore v. Shore*, 4 Drew.

(u) 1 Sch. & Lef. 407; see 501.
Gresley v. Adderley, 1 Sw. 579; (x) *Brigstocke v. Mansel*, 3 *Bertie v. Lord Abingdon*, 3 Mer. Madd. 47.

¹ See *Owing's Case*, 1 Bland, 297; *Cairns v. Chabert*, 3 Edw. C. R. 312; and *Rogers v. Ross*, 4 John. C. R. 402.

SECTION X.—IN PARTNERSHIP CASES.

Principles on which a Receiver is Appointed.—Where an application is made for a receiver in partnership cases, the court is always placed in a position of very great difficulty; on the one hand, if it grants the motion, the effect of it is to put an end to the partnership which one of the parties claims a right to have continued; and, on the other hand, if it refuses the motion, it leaves the defendant at liberty to go on with the partnership business at the risk, and probably at the great loss and prejudice, of the dissenting party. Between these difficulties it is not very easy to select the course which is best to be taken, but the court is under the necessity of adopting some mode of proceeding to protect, according to the best view it can take of the matter, the interests of both parties.^(y)¹

(y) *Madgwick v. Wimble*, 6 see *Blakeney v. Dufaur*, 15 Beav. 500, *per* Lord Langdale; *Beav.* 42.

¹ Two rules upon the subject of the appointment of receivers in cases of partnership seem to be established by the authorities.

First. Where a bill is filed seeking a dissolution of a partnership, and it satisfactorily appears that the complainant will be entitled to a decree for the dissolution, a receiver will be appointed as a matter of course, the obvious reason being that the same causes which would justify a decree for dissolution, would also justify the appointment of a receiver. *Birdsall v. Colie*, 2 Stockt. C. R. 65; *Seighortner v. Weissenborn*, 5 C. E. Green, 177; *Sutro v. Wagner*, 8 C. E. Green, 388; *Dunn v. McNaught*, 38 Geo. 179; *Kirby v. Ingersoll*, Harrington, C. R. 172; *Marten v. Van Schaick*, 4 Paige, C. R. 479. See, however, *Moies v. O'Neill*, 8 C. E. Green, 207.

Second. When a dissolution has already taken place, a Court of Chancery will not appoint a receiver, or take the administration of the partnership assets out of the hands of the party otherwise entitled

In granting or refusing an order for a receiver in partnership cases, the court does not act on the same principles on which it grants or refuses an order for an injunction. In granting a receiver of a partner-

to it, unless there is some mismanagement or improper conduct on the part of the person against whom the relief is sought; the appointment of a receiver after dissolution is *not* a matter of course. *Birdsall v. Colie* (*supra*); *Walker v. House*, 4 Maryl. Ch. Dec. 45; *O'Bryan v. Gibbons*, 2 Id. 9; *Terrell v. Goddard*, 18 Georgia, 664; *Wellman v. Harker*, 3 Oregon, 253; *Tomlinson v. Ward*, 2 Conn. 396; *Harding v. Glover*, 18 Vesey, 281. In *Law v. Ford*, 2 Paige, C. R. 310, however, it was said that "when either party had a right to dissolve the partnership and the agreement between the parties made no provision for closing up the concern, it was of course to appoint a manager or receiver, on a bill filed for that purpose, if they could not arrange the matter between themselves." And in *Sloan v. Moore*, 37 Penna. St. R. 217, Strong, J., said that "it was difficult to see how the necessity of a receiver can be avoided on the dissolution of a partnership when the parties cannot agree as to the disposition of the joint effects, for no one has a right to their possession or control superior to the other." But it is to be observed that in *Law v. Ford* the bill was filed for the purpose of obtaining a dissolution, while in *Moore v. Sloan* the conduct of the defendant was unreasonable and improper, and the receiver was granted on that ground; and the court say, "where a dissolution is intended or has already taken place, a court of equity will always appoint a receiver, *provided there be some breach of the duty of a partner or of the contract of partnership*." These decisions, therefore, when properly considered, are not in conflict with *Birdsall v. Colie* and the other authorities cited above; and even if a conflict of authority on this point is supposed to exist, "it can produce but little embarrassment, because an application for a receiver by either party will rarely be made unless a breach of partnership duty exists;" *per* King, President, in *Gowan v. Jeffries*, 2 Ashmead, 304. See also, upon this subject, *Cox v. Peters*, 2 Beas. 39; *Holden's Administrator v. McMakin*, 1 Pars. Sel. Eq. Cas. 270; *Speights v. Peters*, 9 Gill, 472; *Waring v. Robinson*, Hoffman, C. R. 524; and *Gowan v. Jeffries* (*supra*). In this last case the principles which govern the court in the appointment of a receiver are admirably stated by President King.

ship, the court takes the affairs of the partnership out of the hands of all the partners, and entrusts them to a receiver or manager of its own appointment. In granting an injunction, the court does not take the affairs of the partnership into its own hands, but only restrains one or more of the partners from doing what may be complained of. The order for a receiver excludes all the partners from taking any part in the management of the concern; the order for an injunction merely restrains one of the partners who may have acted in breach of the partnership articles, or may have otherwise misconducted himself, from continuing to act in the way complained of.^(z) It therefore does not follow that because the court will grant an injunction, it will also appoint a receiver, or that because it refuses to appoint a receiver, it will also decline to interfere by an injunction.^(a)¹ In every case where complaints are made of breaches of articles, it must be seen whether they are urged with a view of making them the foundation of a dissolution, or of a decree enforcing and carrying on the partnership, according to the original terms, and preventing, by

(z) See *Hall v. Hall*, 3 Mac. & 12 Beav. 414, 3 Mac. & G. 79, G. 86. where although an injunction

(a) See *Read v. Bowers*, 4 Bro. C. C. 441; *Hartz v. Schrader*, 8 Ves. 317; *Hall v. Hall*, was granted, a receiver was refused.

¹ See *Garretson v. Weaver*, 3 Edw. C. R. 385; also *Low v. Holmes*, 2 C. E. Green, 148, where a receiver was refused, but security was required to be given, with a proviso that in default of giving the security, a receiver would be appointed.

proper means, those breaches recurring which have before happened by reason of the conduct of the parties.(b)

Receiver not Appointed unless a Dissolution be sought.—It is not according to the practice of the court, where it is not the object of the suit to obtain a dissolution of a partnership, but, on the contrary, to continue the partnership, to grant in the course of that suit the appointment of a receiver and manager.(c) The court does not interfere for the management of a partnership, except as incidental to the object of the suit, to wind up the concern and divide the assets.(d) If the court were not to adopt such a rule, it might be called upon to make itself the manager of every trade in the kingdom.(e)

Cases, however, may arise in which a partner was so conducting himself, that, unless a manager was appointed before the hearing, the partnership concern might in the mean time be destroyed. In such case the court would appoint an *interim* receiver and manager.(f) A receiver would also, there is no reason to doubt, be appointed, although the dissolution of the partnership were not sought, in a case where the question was one of the receipt of money only, where,

(b) *Hall v. Hall*, 3 Mac. & G. 86; see *Goodman v. Whitcomb*, 1 J. & W. 593. (d) *Waters v. Taylor*, 15 Ves. 13. (e) *Goodman v. Whitcomb*, 1 J. & W. 592; *Roberts v. Eberhardt*, Kay, 148. (f) *Hall v. Hall*, 3 Mac. & G. 91.

if the money were allowed to be received by the parties, it would not be applied to its proper purposes, and thus at the hearing there would be a failure of justice, unless the court interposed in the mean time.(g)

In *Const v. Harris*,(h) Lord Eldon said that a receiver might be appointed in a suit where a decree could be made for carrying on the concern according to the terms of some specific instrument, which by the agreement of the parties was to regulate the mode of its being carried on, as well as, in a suit for wholly putting an end to the concern ; and a receiver was appointed in that case, although a dissolution was not sought by the bill. The case itself was a peculiar one. The proprietors of a theatre had executed a deed by which they covenanted and agreed that the profits of the theatre should be exclusively appropriated to particular purposes, and that the treasurer for the time being should be irrevocably directed so to apply the profits. Some years afterwards the parties entitled to seven-eighths of the theatre entered into an agreement which provided in some respects for a different application of the profits, and otherwise affecting the rights of a party interested in the remaining one-eighth, who was not consulted on the subject, and upon the application of that party for the specific performance of the covenants and agreements of the original deed, a receiver was appointed. The receiver was a receiver wholly unconnected with the management. His office

(g) *Hall v. Hall*, 3 Mac. & G. (h) T. & R. 517.

was purely a ministerial one. He was to receive all that persons paid for their entrance to the theatre, and to apply it according to certain terms and provisions which the parties themselves had agreed on.⁽ⁱ⁾

It is not necessary that the Bill should Pray a Dissolution.—It is not necessary, in order to induce the court to appoint a receiver, that the bill should expressly pray for a dissolution. It is enough that it be plain that it is necessary to put an end to the concern.^(k) If such be the case, the case stands upon precisely the same basis as if the bill had been filed exclusively for the purpose of the dissolution and the winding up of the concern.^(l) The court will, in all cases, entertain an application for a receiver, if the object of the suit is to wind up the partnership affairs, and the appointment of a receiver is sought with that view.¹ Thus in *Sheppard v. Oxenford*^(m) a bill was filed on behalf of himself and other shareholders, by a shareholder in the National Brazilian Mining Company, against the defendant, its sole director and manager, praying for an account of moneys received and paid by the directors on behalf of the association, and of its debts and the payment thereof out of the assets of the company, and for a division of profits among the share-

⁽ⁱ⁾ See *Hall v. Hall*, 3 Mac. & G. 90.

^(l) *Hall v. Hall*, 3 Mac. & G. 89.

^(k) *Wallworth v. Holt*, 4 M. & C. 619.

^(m) 1 K. & J. 491.

¹ See Iowa Code, Sect. 1656; also *Saylor v. Mockbie*, 9 Withrow (Iowa), 209; *Hubbard v. Curtis*, 8 Clark (Iowa), 1.

holders. The bill also prayed for an injunction to restrain the defendant from selling the property, and for a receiver to get in the debts owing to the company, and all remittances made to it from abroad, and generally to conduct the business and affairs of the association, until the accounts should be taken. No dissolution was expressly asked for, but the whole object of the suit evidently was to wind up the company, and have its assets applied in liquidation of its liabilities; and on a motion by the plaintiff for an injunction and a receiver, an injunction was granted, and a receiver and manager was appointed as prayed by the bill. The defendant, who had gone out to the Brazils after the bill had been filed, was appointed receiver and manager out there.(n)

Again, in *Evans v. Coventry*,(o) the members of two societies, or rather, it would seem, of one society having two branches of business, viz., a loan branch and an insurance branch, filed a bill for the purpose of having the funds of the societies made good by the defaulting directors, and of having the accounts investigated, the affairs of the societies wound up, if necessary, and their assets in the mean time protected by the appointment of a manager and a receiver. It was proved that some of the funds had already been made away with by the secretary; and a manager and receiver was appointed to protect what remained until the hearing of the cause, upon the ground that the

(n) *Ib.* 501.

(o) 5 D. M. & G. 911, reversing 3 Drew. 75.

plaintiffs had an interest in the funds in question, and that the funds were in danger of being lost. It does not appear very distinctly what the manager as distinct from the receiver was expected to do. The Vice-Chancellor refused the motion, mainly on the ground that he could not take upon himself the management of such societies even until the hearing of the cause. The Court of Appeal did not allude to this.

The mere Fact that the Bill may Pray a Dissolution is not enough unless there be a Case for Dissolution.—The mere fact that the bill may pray a dissolution is not a sufficient ground for the appointment of a receiver unless a state of facts is shown upon the bill as will, if proved at the hearing, entitle the plaintiff to a decree for dissolution.(p)¹ The court will not upon motion appoint a receiver, unless it sees that there is an actual present dissolution arising from the acts of the parties,

(p) *Goodman v. Whitcomb*, 1 Beav. 503; *Roberts v. Eberhardt*, J. & W. 589; *Smith v. Jeyes*, 4 Kay, 148.

¹ Even when a dissolution is contemplated by the decree, and there is a disagreement among the partners, it is not in all cases proper to appoint a receiver. In *Slemmer's Appeal*, 58 Penna. St. R. 168, the court directed that the assets of the firm should be transferred to that one or more of the partners who should pay or secure to be paid, within a reasonable time, the highest price for the same, and that upon such assignment and transfer the partnership should be dissolved. "Where a valuable business," said Sharswood, J., "has grown up by the joint labors and contributions of all, the court should be careful to preserve it if possible, and to put all the parties upon a fair and equal footing in competing for it. To appoint a receiver, to direct a sale of the whole, and a winding up of the business, would destroy its value without benefiting either party."

or that at the hearing it will dissolve the partnership. If there has been no misconduct, or no such violation of the articles as to entitle the plaintiff to a dissolution, a receiver will not be appointed.(q) If, however, the court sees its way to a dissolution at the hearing, there is a case for a receiver.(r)¹

If the case made stands in such a state that the court cannot see whether or not there shall be a decree for dissolution at the hearing, it will not take into its own hands the conduct of a partnership which only may be dissolved.(s)

If the partnership is a continuing one and may continue, a receiver will not be appointed. If partners agree upon a term for the partnership to continue, neither partner can dissolve the partnership until the end of the term. But if there be misconduct, the court can and will before the term expires appoint a receiver, and will, though disinclined to such orders, appoint a receiver on interlocutory application. But the case then to be made must not be one raising merely a question whether there is or is not misconduct as between the partners. The court must, especially if there be no term, see its way to a dissolution at the hearing.(t) The question whether there is or is

(q) *Baxter v. West*, 28 L. J. Ch. 169.

(r) *Marsden v. Kaye*, 30 L. T. 197.

(s) *Goodman v. Whitcomb*, 1 J. & W. 592.

(t) *Baxter v. West*, 28 L. J. Ch. 169; see *Waters v. Taylor*,

15 Ves. 25; *Baily v. Ford*, 13 Sim. 495; 12 L. J. Ch. 482;

Bowker v. Henry, 6 L. T. N. S. 43.

¹ *Gowan v. Jeffries*, 2 Ashmead, 296.

not a term, is one proper at the hearing, and is not one that the court will try on an interlocutory application. If there is not sufficient to enable the court upon the interlocutory application to say that at the hearing it will appear there was a term, a receiver will not be appointed.^(u)

Receiver not Ordered in every Case where a Case for Dissolution is made.—The court will not, as a matter of course, appoint a receiver of the partnership assets, even where a case for dissolution is made.^(x) The very basis of a partnership contract being the mutual confidence reposed in each other by the parties,^(y) the court will not appoint a receiver in a suit between members of the partnership firm, unless some special ground for its interference be established.^(z)¹ It must appear that the member of the firm against whom the appointment of a receiver is sought has done acts which are inconsistent with the duty of a partner, and are of a nature to destroy the mutual confidence which ought to subsist between the parties.^(a)²

^(u) *Baxter v. West*, 28 L. J. Bro. C. C. 272; see *Peacock v. Ch.* 169; see S. C. at the hearing, *Peacock*, 16 Ves. 51.

1 Dr. & Sm. 175; *Bowker v. Henry*, 6 L. T. N. S. 43. ^(z) *Harding v. Glover*, 18 Ves. 281.

^(x) *Harding v. Glover*, 18 Ves. 281; *Fairburn v. Pearson*, 2 Mac. & G. 145. ^(a) *Smith v. Jeyes*, 4 Beav. 505; see *Peacock v. Peacock*, 16 Ves. 51; *Chapman v. Beach*, 1

^(y) *Philipps v. Atkinson*, 2 J. & W. 594 n.

¹ See *Terrell v. Goddard*, 18 Georgia, 664, where a receiver was refused; as also in *Parkhurst v. Muir*, 3 Halsted, C. R. 307; *Tomlinson v. Ward*, 2 Conn. 396; and *Slemmer's Appeal*, ante, p. 97.

² The doctrine on this subject is well illustrated by the case of *Williamson v. Wilson*, 1 Bland, 418, and the law well stated by the

Death or Bankruptcy of one Member of a Firm not a Ground for a Receiver.—The death or bankruptcy of one of the members of a firm is not of itself a ground for the appointment of a receiver as against the surviving or solvent partner or partners. The mutual confidence which the members of the firm reposed in each other at the date of the contract, and which formed the very basis of the partnership contract, is not as regards the surviving or solvent partner or part-

Chancellor (p. 426), in commenting upon the facts of that case: "These parties," he says, "admit themselves to be insolvent debtors. The plaintiff charges his copartners, the defendants, with a design to waste the joint property and apply it to their own use. The defendants deny these allegations, and charge the plaintiff with a design to misapply the funds, and to give some of the creditors an undue preference. Taking the charges of the plaintiff and of the defendants, or of either party, to be true, or allow that each or either party was about to waste the property, or has his favorite creditors to whom it is his design to give an undue preference, and it is clear that one or the other or both of them have formed a fixed resolution to violate one of the great principles of equity, which it is the peculiar province of this court to prevent. None of the creditors of these insolvent debtors, so far as it appears, have as yet obtained any legal advantage. It is proper, therefore, that this court should now lay its hands upon the joint property of this partnership, and let all its creditors come in *pari passu*, and according as their respective priorities, if any, should appear. Both parties profess to have had this equitable distribution in contemplation; both acknowledge themselves to be in that insolvent condition, in which the making of such an equitable distribution has devolved upon them as a duty. And each charges the other with having made an effort and formed a fixed design to disregard this duty. Neither of them seems to have the least confidence in the other. Under all these circumstances, I consider this as a case in which it is peculiarly fit and proper that a receiver should have been appointed before answer, and should now be continued as a means of winding up the affairs of this partnership in safety, and with justice and equality to all concerned." See also *Randall v. Morrell*, 2 C. E. Green, 346.

ners affected by the death or insolvency of one of the members of the firm.(b) If a partner dies,(c) or becomes bankrupt,(d) a right to wind up the partnership concern and collect the assets is by law vested in the surviving(e) or solvent(f) partner or partners, as the case may be. Before the court will interfere and appoint a receiver, some breach or neglect of duty on their part must be established.(g)¹

The reasoning on which the court proceeds in refusing to appoint a receiver at the suit of one member of a firm against another, does not apply to the case of persons who acquire an interest in the partnership assets by events over which the parties have no con-

(b) See *Philipps v. Atkinson*, Sm. & G. 487; *Fraser v. Kershaw*, 2 K. & J. 499.
2 Bro. C. C. 272.

(c) *Collins v. Young*, 1 Macq. 385. (g) *Collins v. Young*, 1 Macq. 385. The Court of Probate will

(d) *Fraser v. Kershaw*, 2 K. & J. 499. not appoint a receiver *pendente lite* against a surviving partner,

(e) *Collins v. Young*, 1 Macq. 385; see *Philipps v. Atkinson*, 2 Bro. C. C. 272. unless under very special circumstances. *Horrell v. Witts*, L. R. 1 Pr. & Div. 103.

(f) *Freeland v. Stansfield*, 2

¹ See *Renton v. Chaplain*, 1 Stockton, 62, and *Walker v. House*, 4 Maryl. C. Dec. 45; *Hamill v. Hamill*, 27 Maryl. 679. But a receiver will be appointed as a matter of course, at the suit of the representative of a deceased partner, against a surviving partner, when the latter has been guilty of gross and flagrant violation of duty, such as making a fraudulent conveyance of the partnership assets, absconding from creditors, &c. Such was the case in the firm of Gardner & Brother, whose receiver filed the bill in *Tillinghast v. Champin*, 4 R. Island, 173. And so also where the surviving partner neglects and refuses to settle up the business of the concern within a reasonable time. *Holden v. McMackin*, 1 Pars. Sel. Eq. Cas. 270; *Miller v. Jones*, 39 Illinois, 54.

trol. If a member of a firm dies, or becomes bankrupt, the partnership is determined, as far as his representatives or assignees in bankruptcy are concerned. The representatives of a deceased partner and the assignees of a bankrupt partner are not strictly partners with the surviving or solvent partner or partners; but are only tenants in common with them to the extent of the interest which the partner whom they represent had in the partnership assets at the time of his death or bankruptcy, as the case may be.^(h) It is consequently a matter of course to appoint a receiver when all the partners are dead, and a suit is pending between their representatives;⁽ⁱ⁾ or when such appointment is sought by a partner against the representatives or assignees in bankruptcy of his late copartner.^(k) *Fraser v. Kershaw*^(l) is a good illustration of the doctrine. There one partner had become bankrupt; the share of the other partner had been taken in execution under a *fi. fa.* for a separate debt, and had been assigned to his creditor by the sheriff. The creditor, as the assignee of the sheriff of all the share and interest of the non-bankrupt partner, claimed the right of winding up the affairs of the partnership, and to exclude the assignees of the bankrupt partner from interfering. But, on bill filed by them against the judgment creditor, the court granted an injunction and appointed a receiver, holding that the right of the non-bankrupt

(h) *Ex parte Williams*, 11 Ves. 5, 6; *Wilson v. Greenwood*, Bro. C. C. 272.

1 Sw. 480; *Fraser v. Kershaw*, 1 K. & J. 499. (k) *Freeland v. Stansfield*, 16 Jur. 792; 2 Sm. & G. 479.

(l) 2 K. & J. 496.

partner to wind up the affairs was personal to himself and was not transferable, and did not, therefore, pass with his shares and interest in the partnership assets.

Misconduct of Partner a Ground for a Receiver.—The ground on which the court is most commonly asked to appoint a receiver is where by the misconduct of a partner his right of personal intervention in the partnership affairs has been forfeited, and the partnership funds are in danger of being lost. Mere quarrels and disagreements between the partners, arising from infirmities of temper, are not a sufficient ground for the interference of the court.^(m)¹ The due winding up of the affairs of the concern must be endangered to induce the court to appoint a receiver.⁽ⁿ⁾ The non-coöperation of one partner, whereby the whole responsibility of management is thrown on his copartner, is not sufficient.^(o)²

Where, however, a partner has so misconducted himself as to show that he is no longer to be trusted; as, for example, if one partner colludes with the debtors of the firm, and allows them to delay paying their

(m) See *Goodman v. Whitcomb*, 1 J. & W. 593; *Smith v. Jeyes*, 4 Beav. 505.

(o) *Roberts v. Eberhardt*, Kay, 148; see *Rowe v. Wood*, 2 J. & W. 556, where one partner declined to advance more money to work a mine.

(n) See *Goodman v. Whit-*

comb, 1 J. & W. 593; *Smith v. Jeyes*, 4 Beav. 505.

¹ *Henn v. Walsh*, 2 Edw. C. R. 129.

² See *Smith v. Lowe*, 1 Edw. C. R. 33.

debts;(p) or is carrying on a separate trade on his own account with the partnership property;(q) or if a surviving partner insists on carrying on the business and employing therein the assets of his deceased partner;(r)¹ or where, the partnership property being abroad, one of the partners goes off in order to do what he likes with it;(s) or if the persons having the control of the partnership assets have already made away with some of them;(t) or if there has been such mismanagement as to endanger the whole concern;(u) or if one of the partners has acted in a manner inconsistent with the duties and obligations which are implied in every partnership contract;(x)² in all such cases a receiver will be appointed.

The unwillingness of the court to appoint a receiver at the suit of one member of a firm against another, being based on the confidence originally reposed in each other by the parties, the ground of the rule has no longer any place if it appear that the confidence

(p) *Estwick v. Conningsby*, 1 Vern. 118.

(q) *Harding v. Glover*, 18 Ves. 281.

(r) *Madgwick v. Wimble*, 6 Beav. 495; see *Crawshay v. Maule*, 1 S. W. 507.

(s) *Sheppard v. Oxenford*, 1 K. & J. 491.

(t) *Evans v. Coventry*, 5 D. M. & G. 911

(u) See *De Tastet v. Bordieu*, cited 2 Bro. C. C. 272; *Jefferys v. Smith*, 1 J. & W. 298; *Hall v. Hall*, 3 Mac. & G. 79; see *Chaplin v. Young*, 6 L. T. N. S. 97.

(x) *Smith v. Jeyes*, 4 Beav. 505.

¹ *Holden v. McMakin*, 1 Pars. Sel. Eq. Cas. 270; *Miller v. Jones*, 39 Illinois, 54.

² See *Saylor v. Mockbie*, 9 Withrow (Ia.), 209; *Boyce v. Burchard*, 21 Georgia, 74.

has been misplaced.(a) Where, accordingly, a defendant, by false and fraudulent representations, induced the plaintiff to enter into partnership with him, and the plaintiff soon afterwards, on discovering the fraud, filed a bill praying that the partnership might be declared void and for a receiver, the court on motion ordered that a receiver should be appointed.(b)

There is a case for a receiver, even although there be no misconduct endangering the partnership assets, if one partner excludes another partner from the management of the partnership affairs.(c)¹ This doctrine is acted on where the defendant contends that the plaintiff is not a partner,(d) or that he has no interest in the partnership assets.(e)

In *Hale v. Hale*,(f) where the defendant sought to exclude the plaintiff from all interest in the partner-

(a) See *Chapman v. Beach*, 1 J. & W. 594 n. therefore be a foundation for a receiver; *Kershaw v. Matthews*,

(b) See *Ex parte Broome*, 1 Rose, 69. 2 Russ. 62.

(c) See *Wilson v. Greenwood*, 1 Sw. 481; *Goodman v. Whitcomb*, 1 J. & W. 592; *Rowe v. Wood*, 2 J. & W. 558; *Const v. Harris*, T. & R. 525. A dissolution which takes place on the refusal of an appointee under a will to become a partner is not a dissolution arising from the exclusion of the appointee by the surviving partner, and will not

(d) *Peacock v. Peacock*, 16 Ves. 49; *Blakeney v. Dufaur*, 15 Beav. 40.

(e) *Wilson v. Greenwood*, 1 Sw. 471, where the plaintiffs were the assignees of a bankrupt partner. See also *Clegg v. Fishwick*, 1 Mac. & G. 294, where the plaintiff was the administratrix of a deceased partner.

(f) 4 Beav. 369.

¹ See *Maynard v. Railey*, 2 Nevada, 313-318; *Shulte v. Hoffman*, 18 Texas, 678; *Hottenstein v. Conrad*, 9 Kansas, 435; *Seibert v. Seibert*, 1 Brewster, 531; and *Page v. Vankirk*, Id. 287.

ship assets, and relied on illegality as a defence to the suit, a receiver was appointed. In that case the plaintiff and defendant had carried on the business of brewers for many years in partnership together. The plaintiff filed a bill for a dissolution, and the defendant then denied the plaintiff's right to any account or relief whatever, on the ground that he being a spiritual person was not competent by law to engage in any trading concern, and claimed the whole property himself. A receiver and manager was appointed on the ground that the defendant insisted on a legal objection as destroying all right of his copartner to a share in the profits, although the plaintiff was only a dormant partner, and the defendant's management of the business was in no way complained of.(g)

Inasmuch as the court will not appoint a receiver against a partner, unless some special ground for doing so can be shown, it follows that in a firm of several members there is more difficulty in obtaining a receiver than in a firm of two. For the appointment of a receiver operating in fact as an injunction against the members, there must be some ground for excluding all who oppose the application. If the object is to exclude some or one only from intermeddling, the appropriate remedy is rather by injunction than by a receiver.(h)

(g) See also *Sheppard v. Oxenford*, 1 K. & J. 492, where a receiver was appointed, although the legality of the partnership was denied.

(h) See *Hall v. Hall*, 3 Mac. & G. 79.

Course of Court where the Partnership is Denied.—Where a partnership is alleged on the one side, and denied on the other, and a motion is made for a receiver, the court, if it directs an issue as to partnership or no partnership, usually declines to appoint a receiver until that question is determined.⁽ⁱ⁾

Receiver appointed where Partners have by Agreement divested themselves of the Right of winding up.—Another case in which the court may be called upon to appoint a receiver, is where the partners have by agreement divested themselves, more or less, of their right to wind up the affairs of the concern. In *Davis v. Amer*,^(k) for instance, the plaintiff and defendant on dissolving partnership appointed a third person to get in the assets of the partnership, and agreed not to interfere with him. After the agreement had been partially acted on, one of the partners died, and disputes arising between the executors of the deceased partner and the surviving partner, the latter got in some of the debts of the firm in violation of the agreement. On a bill filed by the executors of the deceased partner for an injunction and a receiver, the court on motion appointed a receiver, but declined to grant an injunction, on the ground that there was no sufficient impropriety of conduct on the part of the defendant to render such an order necessary.^(l)¹

⁽ⁱ⁾ *Peacock v. Peacock*, 16 Ves. 49; *Chapman v. Beach*, 1

^(k) 3 Drew. 64.

^(l) See also *Turner v. Major*, J. & W. 594 n.; *Fairburn v.* 3 Giff. 442.

Pearson, 2 Mac. & G. 144.

¹ And when the respective interests of the partners have passed to third parties, a receiver will be appointed. *Maynard v. Railey*,

Receiver of Mining Partnerships.—In mining partnerships a receiver will be appointed or refused upon the same principles as in other partnerships. Accordingly, if a dissolution or winding up be not sought, a receiver will not be appointed ;(m) but in cases where a dissolution or winding up is sought, a receiver and manager will be appointed if there are any such grounds for the appointment as are sufficient in other cases ;(n) or if the partners cannot agree as to the proper mode of working the mines until they are sold.(o)

In *Rowe v. Wood*,(p) a receiver was refused, although one of the partners excluded the other from interfering in the concern, but the case was a peculiar one, for the partner complained of was not only a partner, but also a mortgagee in possession, and his mortgage debt was still unsatisfied. Again, in *Norway v. Rowe*,(q) although the plaintiff was excluded, a receiver was refused on the ground of his laches, for he had been excluded for

(m) *Roberts v. Eberhardt*, Kay, 148.

(n) *Ib.*; *Sheppard v. Oxenford*, 1 K. & J. 491; see *Rowlands v. Williams*, 30 Beav. 310.

(o) *Jefferys v. Smith*, 1 J. & W. 298; *Roberts v. Eberhardt*, Kay, 159; *Lees v. Jones*, 3 Jur. N. S. 954. A colliery partnership having been dissolved by decree, and the sale of the colliery as a going concern directed, the court will not, until it is found impos-

sible to effect a sale, direct such important alterations in the working as the cutting through a fault, although the evidence be all on one side as to the economy of working to ensue on such a course, there being no immediate necessity for such cutting in order to carry on the concern. *Lees v. Jones*, 3 Jur. N. S. 954.

(p) 2 J. & W. 553.

(q) 19 Ves. 159.

2 Nevada, 313; see also in this connection, *O'Bryan v. Gibbons*, 2 Maryl. Ch. Dec. 9.

some time, and had taken no steps to assert his rights until the mine proved profitable.(r)

In *Rowland v. Williams*,(s) where one of the partners in a mining concern had become a lunatic, the court would not appoint a manager to carry on the business, but ordered a sale, and appointed an *interim* manager only.

Partner appointed Receiver.—If the court, on being applied to for the appointment of a receiver, thinks that a proper case for such appointment is made, and the partner actually carrying on the business has not been guilty of such misconduct as to have rendered it unsafe to trust him, the court generally appoints him receiver and manager without a salary.(t) It is usual, however, to require him to give security duly to manage the partnership affairs, and to account for moneys received by him.(u) In other cases the appointment of a receiver is referred by the judge to the chief clerk, and leave is frequently given for each partner to propose himself. A partner who is appointed receiver becomes the officer of the court, and must act and be regarded accordingly.(x)

(r) See *Clegg v. Edmondson*, 8 D. M. & G. 808.

(s) 30 Beav. 310.

(t) *Wilson v. Greenwood*, 1 Sw. 471; see *Maund v. Allies*, 4 M. & C. 507; *Sheppard v. Oxenford*, 1 K. & J. 501; *Hoffman v. Duncan*, 18 Jur. 69.

(u) *Wilson v. Greenwood*, 1 Sw. 471; *Blakeney v. Dufaur*, 15 Beav. 44.

(x) See *Blakeney v. Dufaur*, 15 Beav. 43. See as to forms of order for a receiver, Set. on Decr. 1030, 1032; *Wilson v. Greenwood*, 1 Sw. 484. (See Appendix.)

Order.—In cases where a receiver is appointed of partnership property, the order should direct the other partners and all other parties to deliver over to the receiver all securities in their hands for such estate or property, and also the stock in trade and effects of the partnership, together with all books and papers relating thereto.^(y) The court may abstain from making an order for the delivery of partnership books and papers if there is no necessity for it, and it would occasion inconvenience.^(z)

SECTION XI.—IN CASES OF BANKRUPTCY.¹

If an equitable case can be made out, the Court of Chancery will interfere in aid of the Court of Bankruptcy.^(a) It is in many cases impossible to arrive at any safe conclusion upon the question of debt or no debt by any other means than a bill in equity. What, too, is joint and separate estate, whether or not specific property is part of the bankrupt's estate, or whether the assignees are about to give to one class of creditors property which belongs to another, or whether the

^(y) Set. on Decr. 1002, 1030,
1031.

^(a) *Pennell v. Roy*, 3 D. M. &
G. 137.

^(z) *Dacie v. John, McClell.*
206.

¹ The position of a receiver in bankruptcy (appointed under the English Bankruptcy rules) is not the same as that of a receiver in chancery. A landlord may distrain against him. *Ex parte Till, Re Mayhew*, 42 L. J. Rep. N. S. 84.

creditors are not entitled to proceed in equity to prove that they are creditors upon the estate, are questions that must often be decided by other courts.(b) But as soon as it has been determined what is the bankrupt's estate, the whole administration of it falls under the jurisdiction of the Court of Bankruptcy. A court of equity has no jurisdiction to interfere in the mere distribution of the estate on the ground of trust or otherwise.(c) The Court of Chancery has jurisdiction to preserve property for the purpose of handing it over to the Court of Bankruptcy, but it is not the proper court to deal with the proofs of creditors, or with the administration and distribution of property when secured and capable of being dealt with by the Court of Bankruptcy.(d)¹

(b) *Thompson v. Derham*, 1 Ha. 358; *Halford v. Gillow*, 13 Ha. 373; see *Meux v. Smith*, 1 Sim. 44.
 M. D. & D. 396; 2 M. D. & D. (d) *Riches v. Owen*, 16 W. R. 789. 964.

(c) *Thompson v. Derham*, 1

¹ Under the Act of Congress of March 2, 1867, "To establish a uniform system of bankruptcy throughout the United States," the appointment of a receiver is not an ordinary step, as it is not usually necessary for the preservation of the property of the bankrupt or alleged bankrupt. That end is ordinarily attained through the powers conferred upon the marshal under the proper order of the court. Cases, however, have arisen in which the appointment of a receiver has been held to be eminently proper. Such was *Sedgwick v. Place*, 3 Bank. Reg. 35. In this case P. and S. had made an assignment to another for the benefit of creditors. They were subsequently adjudicated bankrupts, and Sedgwick became their assignee in bankruptcy. The bill was filed to set aside the assignment for the benefit of creditors. An injunction was granted restraining the assignors and assignees from interfering with or disposing of the property, and, at a subsequent stage of the cause, a motion was made

The Court of Chancery has no jurisdiction to administer assets subject to a trust deed registered under the Bankruptcy Act, 1861. The court will not, at the instance of creditors, appoint a receiver over the trustees of such a deed, except where a very special case for such appointment is made out.^(e) In *Riches v. Owen*^(f) a receiver was appointed; but the bill in that

(e) *Bell v. Bird*, Ib. 1165.

(f) Ib. 964, on Appeal, L. R. 3 Ch. App. 821.

for a receiver. It appeared by affidavits that certain debts due the bankrupts were withheld by the debtors in consequence of this conflict between the two sets of assignees. It was held (by Blatchford, J.) that the appointment of a receiver was a proper and necessary measure. "By the injunction granted by this court on the bill, and which the defendants have not moved to vacate or to modify, the voluntary assignees are restrained from in any manner interfering with the property in question. They, therefore, cannot lawfully collect any of the debts or realize any of the assets, nor can they meddle with the property even to secure it from loss. . . . A receiver who will represent the conflicting titles to the property ought to be put into possession of it, that he may effectually collect all the debts which are collectible, and sell, if necessary, with a clear title, the merchandise which is on hand." So, also, in *Barnes v. Rettew*, 28 Leg. Int. 125, where a bill was filed by an assignee in bankruptcy to set aside a prior assignment for the benefit of creditors, the court said in their opinion (delivered by Cadwalader, J.) that in such a case an injunction would be granted and a receiver appointed, when such a measure was required in order to prevent the purposes of the bankrupt law from being frustrated or impeded. And see *Alabama & Chattanooga R. R. Co. v. Jones*, 5 Nat. Bank. Reg. 97; and *Keenan v. Shannon*, 9 Id. 441. In this last case the Judge said: "I am generally averse to this course in bankruptcy, but where the apparent titles to property are such on their face that the marshal cannot act efficiently under the usual warrant, a receivership may in some cases be indispensable."

In some instances (not reported) the court has appointed a receiver to act as provisional assignee, pending the election of an assignee, when the exigencies of the case required such appointment.

case was filed by the trustees of the deed against the debtor, and the deed was a special one and contained peculiar covenants. The court appointed a receiver so as to preserve the property, and insure its being brought within the limits of the deed, but put the plaintiffs on an undertaking to abide by any directions the Court of Bankruptcy might give as to the property when received and secured.

When assignees in bankruptcy possess themselves of effects which belong to the bankrupt as executor only, the court, on bill filed, will, to secure such effects, appoint a receiver, to whom the assignees shall account for so much as they have got in of the testator's estate.(g)

SECTION XII.—IN CASES OF LUNACY.

A receiver will be appointed over the estate of a lunatic, in cases where it is clearly shown that neither the heir at law nor any of the kin will act as committee, or can give the necessary security, and also that no other person can be found who will act as committee and give the necessary security without being paid.(h) So, also, a receiver may be appointed where the committee is infirm, or where the management of the estate is very onerous;(i) or where the committee lives far from

(g) *Ex parte Tupper*, 1 Rose, 621; *Ex parte Radcliffe*, 1 J. & W. 639.

(h) *Ex parte Warren*, 10 Ves. (i) *Re Birch*, Shelf. on Lun. 187.

the estate.(k)¹ In one case, where it was thought expedient to appoint a receiver, and the person appointed as committee of the estate declined to act as committee if another person was appointed receiver, an inquiry was directed as to the propriety of employing the committee in the latter capacity.(l)

The expense of a receiver, it would seem, is not to be incurred in order that a person who cannot give security may be appointed committee.(m) Notwithstanding the appointment of a receiver, it may happen that a committee of the estate also is required for the more effectual management of the lunatic's property, granting of leases, or the performance of other legal acts which a receiver, not having the legal custody of the estate, is unable to fulfil. In such cases the committee is restrained by the order appointing him from receiving any part of the lunatic's moneys, and gives usually nominal security only.(n)

SECTION XIII.—IN THE CASE OF TENANTS IN COMMON.

The court will not grant a receiver against a tenant in common in possession at the suit of another tenant in

(k) *Re Seaman*, Shelf. on Lun. 187. (n) *Re Billinghamurst*, Amb. 104; *Re Radcliffe*, 1 J. & W. 639; 1

(l) *Re Langham*, 1 Jur. 281. Coop. C. C. 250.

(m) *Re Frank*, 2 Russ. 450.

¹ In the case of *Kenton* (a lunatic), 5 Binney, 613, a commission *de lunatico inquirendo* had issued, and the party had been found to be a lunatic, but the inquisition was not yet returnable. It being shown that the estate was suffering, and that there was no proper person to take care of it, the court appointed a receiver.

common, unless in cases of destructive waste or gross exclusion.^(o)¹ In *Tyson v. Fairclough*,^(p) Sir J. Leach, M.R., expressed a doubt whether, even in the case of an actual exclusion of one tenant in common by another, the court would appoint a receiver, when the party complaining has an estate which he can assert at law, upon the ground that he may relieve himself at law by writ of partition. But the remarks of his Honor do not seem to be borne out by the cases, if indeed they have not been misunderstood.^(q) There are two cases in Dickens' Reports, *Calvert v. Adams*,^(r) and *Evelyn v. Evelyn*,^(s) where a receiver was appointed of undivided estates. They were probably cases of an aggravated nature, warranting the interposition of the court. The ground for the order for a receiver in *Street v. Anderton*^(t) does not appear. But it was said by the counsel in his argument, in *Archdeacon v. Bowes*,^(u) that the reason of it was because the tenant

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| (o) <i>Norway v. Rowe</i> , 19 Ves. | (q) See <i>Searle v. Smales</i> , 3 W. |
| 159; see <i>Scurrah v. Scurrah</i> , 14 | R. 437. |
| Jur. 874; <i>Sanford v. Ballard</i> , | (r) 2 Dick. 478. |
| 30 Beav. 109; but see <i>Searle v.</i> | (s) <i>Ib.</i> 800. |
| <i>Smales</i> , 3 W. R. 437. | (t) 4 Bro. C. C. 414. |
| (p) 2 Sim. & St. 142. | (u) 3 Aust. 752. |

¹ In *Williams v. Jenkins*, 11 Georgia, 595, it was held that the appointment of a receiver upon the application of one tenant in common against his co-tenants, was proper in a case where the defendants were in possession of undivided valuable property, were receiving the whole of the rents and profits, were excluding their companion from the receipt of any portion thereof, and were insolvent. See also *Low v. Holmes*, 2 C. E. Green, 148; *Delaware, &c. R. R. v. Erie R. R.*, 6 Id. 298; and *Pignolet v. Bushe*, 28 How. Pr. R. 9.

in common in possession took more than his share of the profits. In the notes to 4 Bro. C. C. 414, Bell states an anonymous case taken by himself before Sir W. Grant, M.R., sitting for the Lord Chancellor, wherein a receiver was appointed on the motion of a younger brother against the eldest brother, who excluded him on the ground that an agreement made between them to compromise adverse claims, and whereby the eldest brother and heir at law admitted his younger brother to a tenancy in common with him, was entered into while he, the eldest brother, was in a state of intoxication.

In *Milbank v. Revett*,^(x) it seems to have been considered that the principles upon which a receiver is appointed in partnership cases are also applicable to the case of tenants in common. But the case was very shortly and very loosely argued. There can be little doubt that such would not have been the opinion of the court, had the case been more fully argued.^(y)

Exclusion, in the true legal sense of the word, is where one tenant in common receives the whole rents and profits, and refuses to pay over to his companion the share due him.^(z) A bare notice to the tenants by one tenant in common not to pay the rents any longer to the other tenant in common, is not an exclusion. A motion, therefore, for a receiver by one tenant in common, against his co-tenant, on the ground

(x) 2 Mer. 405.

(z) *Tyson v. Fairclough*, Ib.;

(y) *Tyson v. Fairclough*, 2 *Sandford v. Ballard*, 33 Beav. Sim. & St. 142, per Sir J. Leach, 401.

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that the latter had advertised the estate for sale, and had given notice to the tenants to pay their rents to him alone, was refused because the conduct complained of did not amount to an exclusion.(a)

It would seem that in the absence of exclusion, a receiver of the applicant's share of the rents and profits may be appointed;(b) though Lord Northington objected to appoint a receiver of an undivided moiety, because he cannot let, set, or distrain without the owner's consent.(c)

Equitable Tenants in Common.—The same considerations are applicable to the case of tenancy in common in equitable estates. An equitable tenant in common is not entitled to have a receiver appointed as against his companion, unless there be exclusion. If the conduct of the tenant in common in possession amounts to exclusion, or if the trustee puts him in possession of the whole estate to the exclusion of the other, a receiver of the whole property will be appointed. If there be no exclusion, a receiver of the applicant's share only will be appointed.(d)¹

(a) *Tyson v. Fairclough*, 2 Sim. & St. 142; but see *Searle v. Smales*, 3 W. R. 437. (d) *Sanford v. Ballard*, 30 Beav. 109; 33 Beav. 401; see *Street v. Anderton*, 5 Bro. C. C.

(b) *Fall v. Elkins*, 9 W. R. 414; *Tyson v. Fairclough*, 2 Sim. 861; see *Hargrave v. Hargrave*, & St. 145; *Hargrave v. Hargrave*, 9 Beav. 549; comp. *Searle*

(c) *Willoughby v. Willoughby*, v. *Smales*, 3 W. R. 437.
cited 2 Dick. 478.

¹ In *Ware v. Ware*, 42 Georgia, 408, the complainant, a minor, had, in a previous suit, obtained a decree against the defendant for a

Receiver not Appointed on Submission of Party.—Instead of granting the order for a receiver, the court may order the tenant in common in possession to give security for payment of the due proportion of the rents to his co-tenant.^(e)

Some of the Tenants in Common Infants.—Where some of the tenants in common are infants, there may be a receiver over the whole estate, with directions to pay to the adults their shares in the rents.^(f) In a case where there was a dispute between tenants in common of real estate, in reference to the receipt of rents, and some of the parties interested were infants and other tenants for life, the court appointed one of the disputants, who had an estate for life, and another person nominated by the other parties, joint receivers of the whole estate.^(g) If a receiver has been appointed for the benefit of two infant tenants in com-

^(e) *Street v. Anderton*, 4 Bro. C. C. 414.

^(g) *Ramsden v. Fairthrope*, 1 N. R. 389.

^(f) *Smith v. Lyster*, 4 Beav. 227.

certain sum of money improperly appropriated by him, but which was directed, by its terms, to be charged upon certain real estate of the defendant, and to operate as a conveyance to the complainant of an undivided interest to that extent in the same. In the present bill the complainant alleged insolvency on the part of the defendant, that he had refused a sale, was in collusion with others and was committing waste. It was held that it was proper that the court should take possession of the property and compel all parties in interest to come forward and present their respective claims for adjudication and settlement, and to that end the cause was remanded to the Court below with directions to appoint a receiver.

mon, he will not be discharged as to the share of one of them who has attained his full age. The object of appointment having been to protect the property during the infancy of both, and the purpose for which the receiver was appointed not having therefore been fully accomplished, the application for his discharge should be delayed until both are of age.^(h) The one who since the appointment of a receiver has become adult, may, however, apply for the payment of his share to himself.⁽ⁱ⁾

Tenancy in Common when the Interest in Land is in the Nature of a Trade.—If the interest in land in which parties take as tenants in common is in the nature of a trade, a receiver will be appointed or refused on the same principles as in partnership cases.¹ Mines, for instance, are to be considered in the nature of a trade, and where persons have different interests, it is to be regarded as a partnership; and the difficulty of knowing what is to be paid for wages, and the expenses of management, gives the court a jurisdiction as to the mesne profits which it would not assume in other lands.^(k)²

^(h) *Smith v. Lyster*, 4 Beav. 227.

^(k) *Jefferys v. Smith*, 1 J. & W. 298.

⁽ⁱ⁾ *Ib.*

¹ Where M. was interested in unimproved city lots jointly with D., who held the legal title and died having given his executors a power of sale, it was held that the power was subject to the control of the Court for M.'s benefit, and to that end a receiver was appointed. *Marvine v. Drexel's Extrs.*, 18 P. F. Sm. 362.

² See the language of the court in *Hill v. Taylor*, 22 Cal. 191.

There are two ways in which a mining concern may be viewed ; it may be a mining concern really held as property by parties who have acquired it for the purposes of trade, as in a case where an estate containing mines has descended from the owners to two co-heirs ; and such owners, though they did not acquire it for mining purposes, may nevertheless agree to work the mines together with their joint property. That would be working the mines in partnership. There would be a partnership in the working, though not in the land. The other case would be one in which the whole property was intended to be used as a partnership concern. In either case a receiver may be appointed upon the same principles as in other partnership cases.^(l)

SECTION XIV.—IN THE CASE OF PARTIES IN POSSESSION OF
REAL ESTATE UNDER A LEGAL TITLE.

In what Cases a Receiver will not be Granted.—The court will not, at the instance of a person alleging a mere legal title against another party who is in possession of real estate, and who also claims to hold by a like legal title, disturb that possession by appointing a receiver. There being open to the plaintiff a full and adequate remedy at law, he has no equity to come to the court for relief. The court cannot interfere with a legal title, unless there be some equity by which it can affect the conscience of the party in possession.

(l) *Roberts v. Eberhardt*, Kay, 159, per Lord Hatherley.

Where there is an entire want of privity between the parties, and the party in possession is simply a wrongdoer at law, the court will not take upon itself to interpose, unless in certain very exceptional cases. There may be cases in which the court would interfere to prevent absolute destructive waste, where the value of the property would be destroyed, if steps were not taken, or where the contest lies between a person having a well-established pedigree, and a person without any reasonable appearance of title ; but, as a general rule, where one person is in possession of the rents and profits of an estate, claiming to be the holder by a legal title, and another person claims to hold by a like legal title, the former cannot be ousted in this court until that legal title has been finally determined at law.¹ As regards the enjoyment of the ordinary rents and profits of an estate, the court has never assumed a right to interfere with that title which the law confers upon every terre tenant in possession of real property.(*n*)²

(*n*) *Earl Talbot v. Hope Scott*, *v. Duplessis*, 1 Ves. 324 ; 2 Ves. 4 K. & J. 112; *Carrow v. Ferrier*, 360 ; *Clark v. Dew*, 1 R. & M. L. R. 3 Ch. App. 720; see *Knight* 109; *Jones v. Jones*, 3 Mer. 173.

¹ This rule does not apply where the property is already in the custody of a receiver in suits between adverse claimants, and a third party, claiming adversely to all other litigants, asks that the receivership be continued. *State of Tennessee v. J. C. Allen*, 1 Cooper, 512.

² See *Hitchen v. Birks*, L. R. 10 Eq. 471 ; *Parkin v. Seddons*, L. R. 16 Eq. 34; *Schlecht's Appeal*, 60 Penna. St. R. 176; *Pfeltz v. Pfeltz*, 14 Maryl. 376; *Fellows v. Heermans*, 13 Abb. Prac. Rep. (N. S.) 1. See, however, *Rogers v. Marshall*, 6 Abb. Pr. R. (N. S.) 457.

The fact that the estates may be of great value makes no difference in the principle: nor can the argument that immediate injury will be occasioned in the loss of the rents and profits in case a receiver is not appointed be listened to. The court might be inflicting as much injury by granting a receiver as by withholding one.(n) If the devisee of an estate obtains possession by the tenants attorning to him, he holds the estate till some other person can show that he, as heir or otherwise, has a better right to possession.(o) Unless there be a case of collusion between the devisee and the tenants, in inducing them to attorn to him, there is no equity for a receiver.(p) Nor is the fact that some of the tenants may not have attorned to the devisee in possession, a ground for granting a receiver of such rents.(q) In a case, accordingly, where a bill was filed alleging that the plaintiff claiming a certain peerage was entitled to certain estates, as having been inalienably annexed to such peerage by Act of Parliament, and praying for a receiver of the rents and profits of the estate as against the devisee of the late holder of the peerage, who had got into possession of the estates, a demurrer was allowed.(r) So, also, in a case where a party was in possession of property under a will, which he had established against the heir at law in a suit to which the plaintiff was not a party, and the plaintiff claiming as devisee under a prior will, and impugning the validity of the will under which

(n) <i>Earl Talbot v. Hope Scott</i> ,	(p) <i>Ib.</i> 119.
4 K. & J. 119.	(q) <i>Ib.</i> 120.
(o) <i>Ib.</i> 117.	(r) <i>Ib.</i> 96.

the defendant claimed, has recovered a verdict at law, but the verdict had not been confirmed by judgment, the court would not, at the instance of the plaintiff, appoint a receiver, inasmuch as the possession of the defendant was not shown to have been obtained by violence or wrong, and he was in possession under the sanction of the court.(s)¹

The fact that the legal estate may be outstanding in trustees is immaterial to the question.(t) The existence of outstanding terms makes no difference as to the appointment of a receiver, the course of the court being merely to put the outstanding terms out of the way, and not to treat them as introducing new equities.(u)

It is also immaterial to the question that the possession may be vacant, and that the court may not be asked to turn any one out of possession. The law looks on a person in possession of real estate as entitled to keep it till some one else can show a better title. Though the court will interfere to protect per-

(s) *Bainbrigge v. Baddeley*, 621; *Wright v. Wilkins*, 7 W. R. 337. 3 Mac. & G. 413; see also *Lloyd*

v. Passingham, 16 Ves. 70; *Stillwell v. Wilkins*, Jac. 282; *Lancashire v. Lancashire*, 9 Beav. (t) *Bainbrigge v. Baddeley*, 3 Mac. & G. 413.

(u) *Ib.*; *Carrow v. Ferrier*, L. R. 3 Ch. App. 728, per Lord Hatherley. 127; *Toldervey v. Colt*, 1 Y. & C.

¹ The general rule on this subject is followed in the United States. See *Willis v. Corlies*, 2 Edwards, C. R. 281; *The Chicago, &c., Co. v. The U. S. Petroleum Co.*, 57 Penna. St. R. 83; *Stuyvesant v. Davis*, 9 Paige, C. R. 427; *Kipp v. Hanna*, 2 Bland, 26; *Cofer v. Echer-son*, 6 Clarke, 504; *Brady v. Furlow*, 22 Georgia, 613.

sonal estate pending litigation as to probate, the case is different where real estate is the subject of contest. The court will not interfere as to real estate unless there is an equity.(x)

The fact that the party by whose decease the succession has opened may have been a lunatic does not affect the principle. Nor is any equity raised by the circumstance that the person who has been solicitor to the committee of the deceased lunatic was acting as the solicitor of the party who had got possession, and had induced the tenants to attorn to him, nor by the circumstance that some of the tenants had been induced to attorn by the party who had taken possession, granting them leases on very favorable terms.(y)

In what Cases the Court will appoint a Receiver against the Legal Estate.—The court will, however, interfere with the possession of a party holding under a legal title, by appointing a receiver, if a good equitable case be made to appear. If the court is satisfied, upon the pleadings and the materials it has before it, that the relief prayed by the bill will be given at the hearing, and that it is necessary, expedient, or equitable that the property in question should be secured until the hearing, there is a case for a receiver.(z) A receiver, accordingly, will be appointed against a party having

(x) *Ib.* 729.

(y) *Ib.* 720.

(z) *Mordaunt v. Hooper*, Amb.
311; *Huguenin v. Basley*, 13 Ves.
107; *Lloyd v. Passingham*, 16

Ves. 70; *Stillwell v. Wilkins*, Jac.
282; *Clark v. Dew*, 1 R. & M.
103; *George v. Evans*, 4 Y. & C.
211; *Bainbrigge v. Baddeley*, 3
Mac. & G. 420.

the legal title, if a case of fraud be made out to the satisfaction of the court.^(a)¹ Where, for example, a man who had taken a lease of copyholds during the widowhood of a woman who was entitled thereto for her widowhood, had concealed the death of the widow, and, taking advantage of the loss of the court rolls, pretended that the premises were freehold, and had descended to him as heir, Lord Hardwicke granted a receiver.^(b) So, also, in a case where a bill was filed impeaching a sale of land on the ground of fraud, and alleging gross inadequacy of consideration and undue influence, the court appointed a receiver in a suit instituted against the devisees of the party charged with fraud.^(c) So, also, where a woman entitled to a life-interest in certain real estates and a particular sum of stock, and a rent-charge issuing out of her husband's estates, fraudulently obtained a transfer of the stock, and sold it out, and afterwards assigned her life-interest in the real estate and the rent-charge to her son for value, but with notice of the fraud, a receiver of the rents of the real estate, and the rent-charge so assigned, was appointed at the suit of the parties interested in the stock after her death.^(d)

(a) *Huguenin v. Basley*, 13 Ves. 105; *Lloyd v. Passingham*, 282.

16 Ves. 59.

(c) *Stillwell v. Wilkins*, Jac.

282.

(d) *Woodyatt v. Gresley*, 8

(b) *Mordaunt v. Hooper*, Amb. Sim. 187.

311; but see *Carrow v. Ferrier*,

L. R. 3 Ch. App. 729.

¹ See *Corcoran v. Doll*, 35 Cal. 476; and also the remarks of the Chancellor in *Kipp v. Hanna*, 2 Bland, 26.

Another case in which the court will interfere and appoint a receiver against parties holding under a legal title, is where trustees or executors have improperly managed the trust estate.^(e)¹

The disinclination of the court to appoint a receiver where the property is in possession of a party having the legal estate, is felt in those cases only in which the estate of the party in possession is prior to that of the parties in litigation. Where the right to the possession is the subject of dispute, and the plaintiff having an equitable interest claims the legal estate from the defendant in possession, the court will, if it sees clearly that the plaintiff has the right, and that the ultimate decree will be in his favor, appoint a receiver. A receiver, accordingly, will be appointed pending a suit for specific performance against a party holding under a legal title, if the court is satisfied that the decree will be in favor of the plaintiff, and that it is expedient or equitable that a receiver should be appointed.^(f) So, also, and upon the same principle, where a person takes a conveyance of a legal estate, subject to equitable interests, he must satisfy those interests, or submit to the appointment of a receiver.^(g) If, accordingly, the mortgagee of a legal estate, subject to an equitable

^(e) *Supra*, p. 18.

^(f) *Supra*, pp. 85-87.

^(g) *Pritchard v. Fleetwood*,

1 Mer. 54.

¹ A receiver will in some cases be appointed on the application of a landlord as against a tenant; See *Robenson v. Ross*, 40 Georgia, 375. But as a general rule such an application will be refused; *Chicago, &c. Co. v. U. S. Petroleum Co.*, 7 P. F. Sm. 83.

rent-charge, refuse to pay the rent-charge, a receiver will be appointed.(h) So, also, where a judgment creditor had obtained possession of land under an *elegit*, a receiver was appointed at the suit of an equitable mortgagee by deposit of deeds, whose security was prior in date to the recovery of the judgment debt.(i)

The rule that a receiver will not be appointed when the party having the legal estate is in actual possession of the property, does not apply where the party in possession is merely so upon execution under a judgment. In such case, a creditor having taken out execution cannot hold property against an estate created prior to his debt.(k)¹

(h) *Ib.*; see *Shee v. Harris*, 1 728; *Anderson v. Kemshead*, 16 J. & L. 92. Beav. 344.

(i) *Whitworth v. Gaugain*, Cr. (k) *Supra*, p. 58.
& Ph. 325; 3 Ha. 416; 1 Ph.

¹ In some States there are statutes providing that where a party to a civil action shows a probable right to the property which is the subject of the action, a receiver will, under certain circumstances, be appointed. This provision in the New York Code of Procedure has been held to apply to actions to recover the possession of real estate; *Ireland v. Nichols*, 37 How. Pr. R. 222. In this case the previous decisions of *Thompson v. Sherrard*, 12 Abb. Pr. R. 427, 35 Barb. 593, and *The People v. The Mayor of New York*, 10 Abb. Pr. R. 111, were not approved. See also p. 9, *ante*, note 1, as to the Iowa and California statutes on this subject.

CHAPTER III.

OVER WHAT PROPERTY A RECEIVER MAY BE APPOINTED.

A RECEIVER may be appointed of the rents and profits of real estate, and also of all personal estate which may be taken in execution at law.^(a) In all cases where execution may be had at law by writ of *fi. fa.* or *elegit*, it is competent to a court of equity to grant a receiver.^(b) The appointment of a receiver is not limited to such property as may be taken in execution at law, but extends to whatever is considered in equity as assets.^(c)

Salaries, &c.—There cannot be a receiver of the pay or half-pay of officers in the army or navy, for the assignment of such moneys is void upon the grounds of public policy.^(d) Nor can there be a receiver of the salary of a person in the civil service, at least where there is no permanent fund for the payment of it, but

(a) 1 Sw. 83; 2 Sw. 132. See over a rent-charge, *Wise v. Beresford*, 3 Dr. & War. 276; as to a receiver being appointed over a newspaper, *Chaplain v. Cullen v. Dean, &c., of Killaloe*, *Young*, 6 L. T. N. S. 97; *Kelly*, 2 Ir. Ch. 133.
(b) 1 Sw. 83; 2 Sw. 132.
(c) *Blanchard v. Cawthorne*, 4 Sim. 572.
(d) See 2 Beav. 549.
v. *Hutton*, 17 W. R. 425 [*Sloan* v. *Moore*, 37 Penna. St. R. 217]; over tithes, *Lambery v. Helsham*, 1 Ir. Ch. 633; and

¹ See *Hudson v. Plets*, 11 Paige, C. R. 183.

a sum is annually voted by Parliament for the purpose.^(e)¹ The salaries of officers in the public service, indeed, do not appear under any circumstances to be assignable, where the payment is to enable the grantee to perform future duties, and the emoluments of the office are considered necessary to the due discharge of the duties.^(f) There may be a receiver of the office of Master Forester of a Royal Forest.^(g) In *Palmer v. Vaughan*,^(h)² the profits of an office of clerk of the peace having been assigned for the benefit of creditors, a receiver was appointed pending the question as to the validity of the assignment.³

(e) *Cooper v. Reilly*, 2 Sim. Moo. 28; *Hill v. Paul*, 8 Cl. & 564; 1 R. & M. 560; see 2 Fin. 307.

Beav. 550.

(g) *Blanchard v. Cawthorne*,

(f) See *Palmer v. Bate*, 6 4 Sim. 566.

(h) 3 Sw. 173.

¹ In *Stone v. Wetmore*, 42 Georgia, 601, the court refused to appoint a receiver pending a controversy, under a *quo warranto*, between one in possession of a public office (that of ordinary) and a claimant thereto.

² In *Tappan v. Grey*, 9 Paige, C. R. 507, a flour inspector had been illegally appointed by the Governor of New York during the recess of the Senate, and was in the actual discharge of the duties of the office. The former inspector filed a bill claiming the right to hold over until a successor was duly appointed by the Governor with the consent of the Senate, and praying that a receiver might be appointed. It was held that the court had no jurisdiction to appoint a receiver to discharge the duties of the office until the rights of the parties could be legally determined, or to receive the fees and emoluments of the office in the mean time.

³ In Pennsylvania, in cases of contested elections in Philadelphia County, the Court of Common Pleas is directed, upon the application of any citizen, to appoint a receiver to take the fees and emoluments of the office. *Purdon's Digest*, 586, § 261.

Pensions.—A receiver will be appointed over pensions which may be lawfully assigned.⁽ⁱ⁾ There may be a receiver of a government pension for past services.^(k) There cannot, however, be a receiver of a pension granted as well to support the grantee in the performance of future duties as for past services.^(l)

Heirlooms.—A receiver will be appointed of heirlooms or of articles specifically bequeathed by will.^(m)

Rates, Tolls, &c.—There can be no receiver of rates which are to be assessed at a future period, for until the assessment there is nothing to collect.⁽ⁿ⁾ The case of tolls is different from the case of rates. Tolls being a fixed payment and in the nature of a rent, there may be a receiver of the tolls of turnpike roads, or of canal or railway, dock or market companies.^(o)¹ The appointment of a receiver of a public undertaking which is carried on by trustees or rather empowered by statute, does not supersede the powers of the act or

⁽ⁱ⁾ *Heald v. Hay*, 3 Giff. 467. 11 Ha. 251; *per* Lord St.

^(k) *Noad v. Backhouse*, 2 Y. Leonards.
& C. C. C. 529.

^(o) *Knapp v. Williams*, 4 Ves.

^(l) *Davis v. Duke of Marlborough*, 1 Sw. 74, 79; *see* 2 429 n.; *Dumville v. Ashbrook*,
3 Russ. 98 n.; *Drewry v. Barnes*,
Beav. 549. 3 Russ. 105; *Potts v. Warwick*

^(m) *Earl of Shaftesbury v. Duke of Marlborough*, Set. on Kay, 142; *Ames v. Birkenhead*
Decr. 1025. *Docks*, 20 Beav. 332; *De Winton*

⁽ⁿ⁾ *Drewry v. Barnes*, 3 Russ. v. *Mayor &c. of Brecon*, 26
94; but *see Gibbons v. Fletcher*, Beav. 533; *Lord Crewe v. Edleston*, 1 D. & J. 93.

¹ See *ante*, p. 67, note 1.

make the future management illegal, as being carried on by unauthorized persons. The management remains in the hands of the trustees or others empowered by statute to manage it; a receiver does no more than take the rates, tolls, and taxes, and pay the expenses of the undertaking and the interest of the mortgages, and then pay the surplus into court.(p)

Ships.—A receiver may be appointed of the freight of a ship(q) and of the machinery of a steam vessel.(r)

In a case where the legal title to a ship was in question, and the plaintiff had no equitable as distinct from a legal title, a receiver was refused, but an order was made by which the legal proceedings for ascertaining the title were accelerated, and the court took possession of the ship, giving each party liberty to apply for the possession and use upon giving security to deal with her as the court should direct.(s)

Business of Solicitor.—A receiver may be appointed of the profits of the business of a solicitor.(t)

Fellowships, &c.—The question as to whether a receiver can be appointed of the profits arising from the fellowship of a college has been the subject of conflicting decisions. In one case,(u) a motion for a receiver

(p) *Ames v. Birkenhead Docks*, 20 Beav. 350. (s) *Ridgway v. Roberts*, 4 Ha. 106.

(q) Set. on Decr. 1035.

(t) *Candler v. Candler*, Jac.

(r) *Brenan v. Preston*, 2 D. 225.

M. & G. 831; 10 Ha. 334.

(u) *Berkley v. King's College*, 10 Beav. 602.

was refused with costs. But in a later case,^(x) the court held that there might be a receiver both of past and future appropriations in respect of the profits of a fellowship, the duties being so light that no questions of public policy could interfere with the validity of the assignment. So also a receiver has been appointed of the profits of a canonry of a collegiate church, to which no cure of souls belonged, but only the duty of a certain residence and of attendance on divine service, the performance of which duty by the canon was of no benefit to the public.^(y)

Ecclesiastical Benefices.—There cannot be a receiver of the profits of an ecclesiastical benefice, for a beneficed clergyman is prohibited by the statute 13 Eliz., c. 20, from charging the fruits of his living.^(z) The statute of Elizabeth was repealed by the statute 43 Geo. III., c. 84, which was passed in the year 1803, and so the law remained till the year 1817, when by the statute 57 Geo. III., c. 99, the charging ecclesiastical benefices was again prohibited, and the statute of Elizabeth was revived; so that between the years 1803 and 1817 there was no law prohibiting a clergyman from charging his ecclesiastical benefice;^(a) and a receiver was accordingly, on several occasions in cases arising between

(x) *Feistel v. King's College*,
10 Beav. 491.

(y) *Grenfell v. Dean and
Canons of Windsor*, 2 Beav.
544.

(z) *Hawkins v. Gathercole*, 6
D. M. & G. 1; see *Long v. Storie*,
3 DeG. & Sm. 309.

(a) *Metcalf v. Archbishop of
York*, 1 M. & C. 553.

those years, appointed over an ecclesiastical benefice.(b) The policy of the statute 13 Eliz., c. 20, which was revived by 57 Geo. III., c. 99, has not been in any way affected by 1 & 2 Vict., c. 110. A judgment does not create a charge upon a benefice giving a right to a receiver under 1 & 2 Vict., c. 110. The judgment creditor of a beneficed clergyman is prevented by the statute of Elizabeth from suing in equity, to have his judgment made a charge under statute 1 & 2 Vict., c. 110, and cannot have a receiver appointed over the profits of the benefice.(c)

Property in Foreign Parts.—It is not necessary, in order to authorize the court to appoint a receiver, that the property in respect of which he is to be appointed should be in England, or indeed in any of her Majesty's dominions.(d) Thus, persons have been appointed to receive the rents and profits of real estates, and to convert, get in, and remit the proceeds of property and assets, when such property is situate in Ireland,(e) in the West Indies,(f) in India,(g) in Canada,(h) in

(b) *Silver v. Bishop of Norwich*, 3 Sw. 112 n.; *White v. Bishop of Peterborough*, 3 Sw. 109; *Metcalfe v. Archbishop of York*, 1 M. & C. 553; *Courand v. Hanmer*, 9 Beav. 3; Set. on Decr. 1029.

(f) *Bunbury v. Bunbury*, 1 Beav. 336; *Barkley v. Lord Reay*, 2 Ha. 308; *Faulkner v. Daniel*, 3 Ha. 204.

(c) *Hawkins v. Gathercole*, 6 D. M. & G. 1; *Bates v. Brothers*, 2 Sm. & G. 509.

(d) *Houlditch v. Lord Donegal*, 8 Bligh, 344.

(e) *Houlditch v. Lord Done-*

(g) *Logan v. Princess of Coorg*, Set. on Dec. 1038; *Keys v. Keys*, 1 Beav. 425.

(h) *Tylee v. Tylee*, Set. on Decr. 1039.

China,(i) in Italy,(k) in America,(l) in New South Wales,(m) in Jersey.(n) Although the court has no power of sending its officers to places beyond the jurisdiction to enforce its orders and decrees, a party to the cause who resists them will be guilty of contempt.(o) A man will not, however, be appointed receiver of an estate which is out of the jurisdiction, unless he be within the reach of the court, or have submitted himself to, or be amenable to, its jurisdiction.(p)

The course which the court usually adopts where an estate is in a foreign country or out of the jurisdiction, is to appoint a receiver in this country, with power, if it be found expedient, to appoint an agent, with the approbation of the judge, in the country where the estate is situate, to collect the estate and remit the same to the receiver in this country.(q) The receiver or his agent will recover possession of the estate according to the laws of the country in which it is found.(r) The receiver will, when necessary, be em-

(i) *Hodson v. Watson*, Set. on Decr. 1038. *ford*, 5 L. J. Ch. N. S. 60; *Houlditch v. Donegal*, 8 Bligh. 344;

(k) *Hinton v. Galli*, 24 L. J. Ch. 121; 2 Eq. Rep. 479; *Drewry v. Darwin*, Set. on Decr. 1039. *Carron Iron Co. v. Maclaren*, 5 H. L. 436.

(l) *Hanson v. Walker*, Set. on Decr. 1039. (q) — *v. Lindsay*, 15 Ves. 91; *Keys v. Keys*, 1 Beav. 425; *Smith v. Smith*, 10 Ha. App. 71;

(m) Set. on Decr. 1038. *Hinton v. Galli*, 24 L. J. Ch.

(n) *Smith v. Smith*, 10 Ha. App. 71. 211; 2 Eq. Rep. 479; Set. on Decr. 1039.

(o) *Langford v. Langford*, 5 L. J. Ch. N. S. 60. (r) *Smith v. Smith*, 10 Ha. App. 71.

(p) See *Langford v. Lang-*

powered to sell lands abroad, according to a scheme approved by the judge.(s)¹

(s) *Tylee v. Tylee*, Set. on Decr. 1039.

¹ It has recently been held, in the Supreme Court of New York, that the appointment, in that State, of a receiver of a mining company whose property consisted entirely of real estate situated in another State, conferred no title. *Simpkins v. The Smith & Parmelee Gold Co.*, 50 How. Pr. R. 56.

CHAPTER IV.

WHO MAY BE APPOINTED RECEIVERS.

Party to Suit.—A receiver should, as a general rule, be a person wholly disinterested in the subject-matter of the suit, but it is competent to the court, upon the consent of the parties, to appoint as receiver a person who is mixed up in the subject-matter of the suit, if it is satisfied that the appointment would be attended with benefit to the estate. A tenant for life has accordingly been appointed a receiver.^(a) So also in a suit to dissolve a partnership, one of the partners was appointed receiver.^(b)¹ So also a retired partner who had advanced all the capital and was liable for the partnership debts, was appointed receiver.^(c) A party to the suit will not be appointed a receiver, unless on his undertaking to act without salary.^(d)

When a party to the cause has been appointed receiver, he does not thereby lose his privilege as such party in the cause.^(e)²

(a) *Powys v. Blagrove*, 18 Jur. 463. (d) *Wilson v. Greenwood*, 1 Sw. 471, 483; *Blakeney v. Dufaur*, 15 Beav. 40, 44; *Hoffman v. Duncan*, 18 Jur. 69; *Powys v. Blagrove*, *Ib.* 463.

(b) *Wilson v. Greenwood*, 1 Sw. 471, 483; *Blakeney v. Dufaur*, 15 Beav. 40, 44. (e) *Scott v. Platel*, 2 Ph. 229.

(c) *Hoffman v. Duncan*, 18 Jur. 69.

¹ *Surgant v. Read*, L. R. 1 Ch. D. 600.

² Of course, if a party to a cause accepts the position of receiver, his interest must not be permitted to interfere with his duties as receiver. See *Bolles v. Duff*, 54 Barbour, 216.

Trustee.—It is not according to the course of the court to appoint a trustee receiver. A person on whom the character and duties of a trustee are substantially imposed, and who is directly connected with the management of the estate, cannot in general be appointed a receiver.^(f) The court on appointing a receiver looks to the trustee to see that the receiver is doing his duty. The *cestui que trust*, if he is to have a receiver, is entitled to the superintendence of the trustee as a check.^(g) The two characters of trustee and receiver are in fact incompatible, and in addition to this, the appointment of a trustee as receiver would be in violation of the fundamental rule of equity that a trustee cannot derive any benefit from the discharge of his duty as trustee.^(h) The court will even remove a receiver whose private interests are in conflict with his duties, though his acts have for the most part been for the general good of the property, and though a majority, both in number and value, of the incumbrancers, desire that he should be retained.⁽ⁱ⁾ The rule that a trustee cannot be a receiver applies whether he is sole trustee or is acting jointly with others.^(k)

In special cases, however, where the appointment of a trustee as receiver would be beneficial to the estate, as when he has a peculiar knowledge of the estate, or no one else can be found who will act with the same

^(f) *Sutton v. Jones*, 15 Ves. 587.

^(h) *Ib.*

^(g) *Anon.*, 3 Ves. 515; *Sykes v. Hastings*, 11 Ves. 363; *Sutton v. Jones*, 15 Ves. 587.

⁽ⁱ⁾ *Fripp v. Chard Railway*, 11 Ha. 241, 260; see *Cookes v. Cookes*, 2 D. J. & S. 530.

^(k) — *v. Jolland*, 8 Ves. 72.

benefit to the estate, the court will make the appointment. But the trustee must engage to act as receiver without emolument.^(l) Upon this undertaking a testamentary guardian and executor,^(m) and a tenant for life who was also a trustee,⁽ⁿ⁾ has been appointed a receiver.

In *Ames v. Birkenhead Docks*,^(o) the chairman of the trustees of a dock company was appointed receiver of the tolls of the company. So also in *Potts v. Warwick and Birmingham Canal Company*,^(p) one of the committee of management of a company was appointed receiver of the tolls of the company.¹

(l) *Sykes v. Hastings*, 11 Ves. 363; *Sutton v. Jones*, 15 Ves. 463.

584. (o) 20 Beav. 232.

(m) *Gardner v. Blaine*, 1 Ha. 381. (p) *Kay*, 143.

¹ It has been decided in New York, in proceedings under the statute of that State against insolvent corporations at the relation of the Attorney-General, that an officer of the corporation is not a proper person to be appointed receiver of its assets. *The case of the Franklin Bank*, cited in *The Attorney-General v. The Bank of Columbia*, 1 Paige, C. R. 511-517. . . . "Public policy," said the court, in the case last cited, "requires that the directors shall understand distinctly that if they so manage the concerns of the institution as to produce insolvency, the property and effects of the institution will be taken from them entirely, and will be placed in the hands of those who will investigate their conduct fearlessly and impartially." But the same learned judge also held, in a subsequent case, that the same rule did not apply to proceedings under the statute relative to voluntary dissolutions, the appointment of the officers of the institution being expressly authorized by the act. *In the matter of the Eagle Iron Works*, 8 Paige, C. R. 385; 3 Edwards, C. R. 385. In *The People v. The Third Avenue Savings Bank*, 50 How. Pr. R. 22; it was held that the secretary of an insolvent savings bank should not be appointed receiver.

Where indeed a trustee offers to act as receiver without salary, he will be allowed to propose himself, but the judge is not bound to accept him.(q) The court will not appoint a trustee as receiver, even although he agrees to act without emolument, if he is the person that ought to check the receiver for the benefit of the parties interested.(r)

Under very special circumstances a trustee may be appointed receiver with a salary. Where, for instance, a testator had appointed as trustee a person who for many years had been paid receiver and manager of his estate, the tenant for life being an infant, he was continued a receiver with a salary.(s)

The objection to the appointment as receiver of a trustee who has active duties to perform in relation to the estate, does not apply to the case of a trustee to preserve contingent remainders, or with powers of sale and exchange which cannot be immediately exercised.(t) A trustee with power to lease cannot, however, be a receiver.(u)

Party in a Fiduciary Position, &c.—The rule that the court will not sanction the appointment as receiver of a person whose duty it is to check and control the receiver is extended to other persons besides trustees.(x)

(q) *Banks v. Banks*, 14 Jur. 659.

(t) *Sutton v. Jones*, 15 Ves. 587.

(r) *Sykes v. Hastings*, 11 Ves. 363; *Sutton v. Jones*, 15 Ves. 584.

(u) *Ib.*

(s) *Bury v. Newport*, 23 Beav. 30.

(x) See *Cookes v. Cookes*, 2 D. J. & S. 530.

Thus it has been held, that, as it is the duty of the next friend of an infant to watch the accounts and check the conduct of a receiver of the infant's estate, the two characters are incompatible with each other;(y) and in *Taylor v. Oldham*,(z) Lord Eldon held that the son of a next friend ought not to be receiver. Upon similar grounds it has been held that a solicitor in the cause cannot be appointed receiver, because it is his duty to control the receiver's accounts.(a)

Nor will a man be appointed receiver whose position may cause difficulty in administering justice. A Master of Chancery, accordingly, was disqualified from being appointed a receiver, for, being an officer whose duty it was to pass the accounts and check the conduct of a receiver, his appointment as a receiver was open to objection on very obvious grounds.(b)¹ The same reason which disqualified a Master in Chancery from being receiver applies to the appointment of a person who acts as solicitor under a commission of lunacy.(c) There can be no doubt it also applies to the chief clerk of a judge.²

(y) *Stone v. Wishart*, 2 Madd. 64. (b) *Ex parte Fletcher*, 6 Ves. 427.

(z) Jac. 527, 529.

(c) *Ex parte Pincke*, 2 Mer.

(a) *Garland v. Garland*, 2 Ves. Jr. 137; *Wilson v. Poe*, 1

Hog. 322.

¹ The same point was decided in *Benneson v. Bill*, 62 Ill. 408.

² An official liquidator, appointed upon the voluntary winding up of a company, may be appointed receiver. *Perry v. Oriental Hotels Company*, L. R. 5 Chan. App. 420.

Solicitor.—Though a solicitor in the cause,(d)¹ or a solicitor under a commission of lunacy,(e) cannot be appointed receiver of the estate in which they are retained as solicitors, there is no objection in general to the appointment of a solicitor as receiver.(f) In *Bagot v. Bagot*,(g) the solicitor of a married woman was on her application appointed receiver of her separate estate, although a strong affidavit was made by the husband showing the unfitness of the solicitor for the office.

Considerations looked to in making the Appointment.—The person appointed as receiver should be a person

(d) *Garland v. Garland*, 2 Ves. Jr. 137.

(f) See *Wilson v. Poe*, 1 Hog. 322; *Della Cainiea v. Hayward*,

(e) *Ex parte Pincke*, 2 Mer. 452.

(g) *McClell. & Y.* 272.

(g) 2 Jur. 1063.

¹ This rule was recognized in *Baker v. Backus*, 32 Illinois, 79-95. "There was a fatal objection," said the court "to the person appointed receiver. He was not disinterested; he was the legal adviser of the complainant, and framed the bill; he was the legal adviser of the company, and he was the largest single creditor—all these disqualified him." But in the *Case of Abraham Powell*, an involuntary bankrupt (in the U. S. District Court for the Eastern District of Pennsylvania), the solicitor for the petitioning creditors was appointed a temporary receiver of the estate. This case, however, is not to be regarded as in conflict with the general rule, for the property of the bankrupt had previously become vested in assignees for the benefit of creditors under the State law, and the duties of the receiver (who was to act as such pending the election of an assignee in bankruptcy) were mainly, if not altogether, supervisory. This appointment was also in accordance with the rule which permits the creditor's attorney to act as assignee in bankruptcy. See *Ex parte Clairmont*, 1 Bank. Reg. 42; *Ex parte Lawson*, 1 Gaz. 132; *Ex parte Barrett*, 1 Chicago Leg. News, 202.

who, consistently with his professional and other pursuits, can spare sufficient time for the duties of his office, and the court will attend to circumstances tending to show that the person proposed as receiver is unable to fulfil this condition.^(h) In a case, accordingly, where a man proposed as receiver was both a member of Parliament and a practising barrister, and also resided at a very considerable distance from the estate, the court held that these circumstances, though not amounting to an absolute disqualification, formed a sufficient ground to render further consideration advisable.⁽ⁱ⁾ There is no objection to the appointment as receiver of a practising barrister not being a member of Parliament.^(k)

Peer; Member of Parliament.—The court will not appoint as receiver a person whose privileges protect him from the ordinary remedies which it may become proper to enforce.^(l) A peer accordingly is disqualified.^(m) Lord Eldon would not say that a member of Parliament was absolutely disqualified,⁽ⁿ⁾ but the same considerations which render the appointment of a peer objectionable would seem also to apply to the case of a member of Parliament.^(o)

(h) *Wynne v. Lord Newborough*, 15 Ves. 284.

(i) *Ib.* 283.

(k) *Ib.*; *Garland v. Garland*, 2 Ves. Jr. 137; *Wilkins v. Williams*, 3 Ves. 587.

(l) *Att. Gen. v. Gee*, 2 V. & B. 208.

(m) *Ib.*

(n) *Wynne v. Lord Newborough*, 15 Ves. 284.

(o) See *Long Wellesley's Case*, 2 R. & M. 639; *Lechmere Charlton's Case*, 2 M. & C. 316.

Accountant to Crown, &c.—A person who is under security to the Crown, as the receiver-general of a county, cannot be appointed a receiver, for if he were to be indebted to the Crown, the Crown might by its prerogative process sweep away all his property, and his debt to the estate would be lost.^(p) Upon the same principle it might be held that any person who is in the position of an accountant to the Crown would be objectionable.^(q)

Mortgagee of West India Estate appointed Consignee.—The mortgagee of a West Indian estate who does not take possession will not be appointed consignee unless he has stipulated for the advantage. If a mortgagee of a West Indian estate has not a contract that he shall have the consignments, he cannot have any such emoluments from the estate. If it were allowed, the second mortgagee would move for a receiver and consignee, and the first mortgagee would be appointed, and thus circuitously obtain an advantage which he could not have obtained directly.^(r)

^(p) *Att.-Gen. v. Day*, 2 Madd. 254.

^(r) *Cox v. Champneys*, Jac. 576; *Ex parte Pincke*, 2 Mer.

^(q) *Dan. Ch. Pr.* 1570.

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CHAPTER V.

MODE OF THE APPOINTMENT OF A RECEIVER.

Receiver not appointed unless in a Suit.—The court has no jurisdiction to appoint a receiver unless a suit is pending.^(a) The case of infants forms no exception to the rule.^(b) In some cases the same person has been appointed guardian and receiver of the person and estate of an infant on petition or summons in chambers, without suit; and in other cases separate persons have been appointed guardian and receiver on summons in chambers.^(c) The more usual course, how-

(a) In cases coming within the Railway Companies Act, 1867, 30 & 31 Vict., c. 127, a receiver may be appointed on petition, *supra*, p. 76. The Court of Chancery in Ireland may appoint a receiver on summary petition by a judgment creditor. Under the Acts 5 & 6 Will. IV., c. 55, ss. 31, 32, and 3 & 4 Vict., c. 105, ss. 21, 23, 24, the jurisdiction of the Court of Chancery in Ireland to appoint a receiver on summary petition by a judgment creditor was very extensive. See Reilly on Petitions. It has, however, been much restricted by more re-

cent legislation, 12 & 13 Vict., c. 95; 13 & 14 Vict., c. 29; 19 & 20 Vict., c. 77, s. 3. See Reilly on Summ. Petit. 374 *et seq.* [*Baker v. Backus*, 32 Illinois 79–95]

(b) *Ex parte Whitfeld*, 2 Atk. 315; *Ex parte Mountford*, 15 Ves. 445, 449.

(c) *Re Leeming*, 20 L. J. Ch. 550; 17 L. T. 231; *Re Reynolds*, 19 L. T. 311; *Re Gascoyne*, 20 L. J. Ch. 551; Set. on Decr. 705. The Lord Chancellor of Ireland has power under 5 & 6 Will. IV., c. 78, s. 7, to appoint a receiver over the estate of a minor upon petition, *Re Goode*, 1 Ir. Ch. 256.

¹ In *Newman v. Hammond*, 46 Indiana, 119, it was held that, under the Indiana statute, the court would not appoint a receiver in vacation.

ever, is to appoint a guardian of the person and estate without a receiver.(d) The case of lunatics is the only exception to the rule that a receiver will not be appointed unless a suit is pending. In the case of lunatics a receiver may be appointed on petition without bill filed.(e) The court has no jurisdiction to appoint a receiver in cases of bankruptcy, except on bill filed.(f)¹

A receiver may be appointed after an administration decree in a suit commenced by summons.(g)

Where the Application should be made.—In a suit commenced by summons, or where the appointment is by consent, the application for the appointment of a receiver should be made in chambers.(h) If the application is in a cause, and it is the first application in the cause for the appointment of a receiver in the place of a person already in possession, it must be made in open court, and cannot be made in chambers; but where the application is not an original application for the appointment of a receiver in the cause, but is only an application to supply the place of a receiver already appointed, it should be made in chambers.(i)

(d) Set. on Decr. 705.

Jur. N. S. 227; *Brooker v.*

(e) 1 Atk. 488; *Ex Parte*

Brooker, 3 Sm. & G. 475.

Whitfield, 2 Atk. 315; *Ex parte*
Mountford, 15 Ves. 445, 449.

(h) *Blackborough v. Ravenhill*, 16 Jur. 1085; 22 L. J. Ch.

(f) *Ex parte Tupper*, 1 Rose,

108.

179.

(i) *Grote v. Bing*, 20 L. T.

(g) *Re Bywater's Estate*, 1

124; 1 W. R. 80; 9 Ha. App. 50;
Booth v. Coulton, 16 W. R. 685.

¹ See *ante*, pp. 110, 111, 112.

Appointment made on Motion or Petition.—The application for a receiver is usually made on motion, but the appointment may be obtained on petition.^(k) If the application is made by the defendant, a petition should be made use of.^(l)

It was formerly the practice not to appoint a receiver before answer, but the old rule not to appoint a receiver before answer was broken through by Lord Kenyon in *Vann v. Barnett*;^(m) and it is now well settled that a receiver may be appointed before answer, if a sufficient case for the appointment be shown by the affidavits.⁽ⁿ⁾¹

^(k) See *Bainbridge v. Blair*, 18 Ves. 283; *Scott v. 4 L. J. Ch. N. S. 207.* *Becker*, 4 Pri. 346; *Metcalfe v.*

^(l) *Hiles v. Moore*, 15 Beav. *Pulvertoft*, 1 V. & B. 180, 183; 175; see *Barlow v. Gains*, 8 *Aberdeen v. Chitty*, 3 Y. & C. 379; *Woodyatt v. Seeley*, 8 Sim. 183, 189; *Pitcher v. Helliard*, 2 Dick. 580; *Maguire v. Allen*, 1 Ball & B. 75-

^(m) 2 Bro. C. C. 158; see *Jervis v. White*, 6 Ves. 738.

⁽ⁿ⁾ *Middleton v. Dodswell*, 13 Ves. 266; *Duckworth v. Traf-*

¹ "A receiver," say the court in *Williamson v. Wilson*, 1 Bland, 422, "is never appointed before answer, but upon very strong special ground supported by affidavit, or, as is the practice in this State (Maryland), on a bill sworn to by the complainant, or, in case of his not being in the State, by some one conversant with the facts stated. A motion to rescind an appointment is always heard on short notice, and a receiver is in no case permitted to take charge of the property without having first given bond with approved surety." See also *Bloodgood v. Clark*, 4 Paige, C. R. 577; *Simmons v. Henderson*, 1 Freeman (Ch.), 500; *Bank v. Schermerhorn*, 7 Clarke, C. R. 214; *Jones v. Dougherty*, 10 Georgia, 281; *McDougald v. Dougherty*, 11 Georgia, 584; *Williams v. Jenkins*, 11 Id. 597; *Johns v. Johns*, 23 Id. 31; *Hungerford v. Cushing*, 8 Wisconsin, 322; *Whitehead v. Wooten*, 43 Miss. 523; and cases cited in the next note.

An application for a receiver cannot, except under very exceptional circumstances, be made without notice.¹ Notice of the motion or summons, as the case may be, must be served on the party against whom the motion is made.(o) An application, *ex parte*, for a receiver before appearance, is irregular,(p) except a case of great urgency be made to appear.(q) Leave may be had in cases where the circumstances are urgent to serve the defendant with notice of motion for a receiver before the expiration of the time fixed for appearance. The notice of the motion must be served on the defendant personally;(r) and the fact of leave having

- (o) Dan. Ch. Pr. 1571. T. N. S. 595; see *Dickens v. Harris*, 14 L. T. N. S. 98.
 (p) *Buxton v. Monkhouse*, Coop. 41; *Caillard v. Caillard*, 25 Beav. 512. (r) *Hill v. Rimmell*, 2 M. & C. 641; *Ramsbottom v. Freeman*, 4 Beav. 145; *Meaden v. Sealey*, 6 Ha. 620.
 (q) *Rawson v. Rawson*, 11 L.

¹ A receiver will not be appointed without notice except where pressing necessity exists, and there is clear proof of the exigency of the particular case. *Triebert v. Burgess*, 11 Maryl. 456; *Blondheim v. Moore*, Id. 374; *Clark v. Ridgely*, 1 Maryl. Ch. Dec. 70; *Nusbaum v. Stein*, 12 Maryl. 315-322; *Gravenstine's Appeal*, 49 Penna. St. R. 310; *Bostwick v. Isbell*, 41 Conn. 305; *Weems v. Lathrop*, 42 Tex. 211; *The People v. Norton*, 1 Paige, C. R. 17; *Tibbals v. Sargeant*, 1 McCart. 449; *Sandford v. Sinclair*, 8 Paige, C. R. 373; 3 Edwards, C. R. 393; *Gibson v. Martin*, 8 Paige, C. R. 481; *Verplanck v. The Mercantile Ins. Co.*, 2 Id. 450; *French v. Gifford*, 30 Iowa. 148; *Bisson v. Curry*, 35 Id. 72; *Whitehead v. Wooten*, 43 Miss. 523; *Vause v. Wood*, 46 Miss. 120; *Turgeon v. Brady*, 24 Louisiana Ann. 348; *Field v. Ripley*, 20 How. Pr. R. 26; *McCarthy v. Peake*, 18 Id. 138; *Devoe v. The Ithaca and Oswego Railroad Co.*, 5 Paige, C. R. 521. In this last case, however, the court, although refusing to appoint a receiver on an *ex parte* application, nevertheless granted an injunction pending the motion. See also *Austin v. Figueira*, 7 Paige, C. R. 56.

been obtained must be mentioned in the notice of motion.^(s) The order will be granted on affidavit of service of notice of the motion.^(t) The application for a receiver cannot be granted before appearance on notice of motion served personally, unless such service be by special leave of the court.^(u) Leave to serve defendant with notice of motion for a receiver before appearance does not include leave to give short notice of motion. Short notice of motion cannot be given without express leave for that purpose.^(x)

The rule which requires previous notice to be served on a defendant who has not appeared is subject to an exception where the defendant has absconded to avoid service, and his residence is unknown.^(y) So, also, it was under the old practice held to be subject to an exception where the defendant was out of the jurisdiction and could not be served.^(z) But inasmuch as under the new practice an order may now be made for service of the bill on a party who is out of the jurisdiction,^(a) a receiver will not, there is reason to believe, be appointed before service of the bill, where a party whose interest is sought to be affected by the decree is out of the jurisdiction,^(b) unless his residence

^(s) *Hill v. Rimmell*, 8 Sim. 632; *Jacklin v. Wilkins*, 6 Beav. 608.

^(t) *Meaden v. Sealey*, 6 Ha. 620.

^(u) *Ramsbottom v. Freeman*, 4 Beav. 145.

^(x) *Hart v. Tulk*, 6 Ha. 611.

^(y) *Dowling v. Hudson*, 14 Beav. 423.

^(z) *Tanfield v. Irvine*, 2 Russ. 149; *Coward v. Chadwick*, 1b. 150 n., 634 n.; *Gibbins v. Mainwaring*, 9 Sim. 77; see *Noad v. Backhouse*, 2 Y. & C. C. 529.

^(a) Ord. X. r. 7; Morg. Ch. Ord. 423.

^(b) See *Stratton v. Davidson*, 1 R. & M. 484; *Brown v. Blount*, 2 R. & M. 83.

be unknown, or the circumstances of the case be urgent. The leave of the court, however, is necessary, it would seem, to serve personally a party out of the jurisdiction with notice of motion in the cause, although such party has been served with a copy of the bill and appearance has been entered for him.(c)

If a defendant has made an affidavit in the cause, although no formal appearance be entered, he will be considered to have appeared for the purpose of appointing a receiver.(d)

Receiver appointed at any Stage of the Suit.—The application for a receiver may be made at any stage of the suit, according as the urgency of the case requires it.¹

(c) *Green v. Pledger*, 3 Ha. (d) *Vann v. Barnett*, 2 Bro. C. 165; see *Wequelin v. Lawson*, 8 C. 158.
L. T. N. S. 763.

¹ As a receiver may be appointed at any stage in the cause, it may be proper to notice here the authority of superior courts to review the action of inferior tribunals in making or refusing to make such an appointment.

In England an appeal lies from an interlocutory order. Daniel's Chancery Prac. 1568. In the United States courts, however, the rule is different, as the Act of Congress of September 24, 1789 (Rev. Stats. Sects. 631 and 699), by which this subject is regulated, allows appeals from final decrees alone. Hence no appeal will lie from an interlocutory order, such as the appointment of a receiver, or the like. See remarks of Taney, C. J., in *Forgay v. Conrad*, 6 Howard, 204; also *Perkins v. Fourniquet*, Id. 206. But cases may arise in which an order appointing or discharging a receiver may operate as a final decree; and in such a case an appeal would lie. See *The Milwaukee R. R. Co. v. Soutter*, 2 Wallace, 521, stated *ante*, p. 4, note; and *Cain v. Warford*, 7 Maryl. 282, and *Barry v. Briggs*, 22 Mich. 201, are to the same effect.

In the State courts the rule on this subject is not uniform, being

If the application for a receiver is made before decree, it will not be granted, unless the appointment of a receiver be prayed by the bill. The court will not even give leave to amend for the purposes of the motion.(e)

Receiver appointed at hearing, though not prayed for—A receiver may be appointed at the hearing, although not prayed by the bill, if the facts stated are sufficient to authorize the appointment, and the urgency of the case requires it.(f)¹ A receiver may also be appointed

(e) *Pare v. Clegg*, 7 Jur. N. S. 2 Moll. 500; *Osborne v. Harvey*, 1136; 9 W. R. 216; but see 1 Y. & C. C. C. 116; see *Shee v. Mulcolm v. Montgomery*, 2 Moll. *Harris*, 1 J. & L. 91; comp. 3 Drew. 120.

(f) *Mulcolm v. Montgomery*,

in many instances regulated by statute. It was held in *Jones v. Holliday*, 37 Georgia, 573, and *Reid v. Reid*, 24 Id. 38, that the discretion of the inferior court in appointing a receiver would be reviewed on appeal, if shown to have been abused, but not otherwise. See also *Robenson v. Ross*, 40 Georgia, 375.

An appeal does not lie from such an order in Pennsylvania, *Holdin v. McMakin's Admrs.*, 1 Pars. 289; nor in New York, *Turner v. Chrichton*, 53 N. Y. 641; nor in Montana, *Wilson v. Davis*, 1 Mont. R. 98; nor in Indiana, *Wood v. Brewer*, 9 Indiana, 86; nor in Alabama, *Mansony v. The Bank*, 4 Alab. 745; nor in Michigan, *Colgate v. Michigan Lake Shore R. R. Co.*, 28 Mich. 288, *Salling v. Johnson*, 25 Id. 489. In Mississippi it has been held to be authorized by the statute; *Wade v. The American Col. Soc.*, 4 Sm. & Marsh. 680. So also in Iowa; *Callanan v. Shaw*, 19 Iowa, 185. See *Collins v. Case*, 25 Wisc. 651. When a decree is made in a cause wherein a receiver has been appointed and an appeal is taken from that decree, the office of receiver is not vacated by the appeal; *Swing v. Townsend*, 24 Ohio St. 1.

¹ *Henshaw v. Wells*, 9 Humph. 568. The facts showing the propriety of appointing a receiver should appear in the bill. *Tomlinson v. Ward*, 2 Connecticut, 396. See also *Oakley v. The Paterson*

after decree, without filing a supplemental bill, in cases of urgency.(g) A receiver, for instance, was appointed after decree in a case where a person, not being a party to the cause, had been so long in possession without accounting that there was danger of his acquiring an absolute title by adverse possession.(h) So also a receiver was appointed after decree in a case where the mortgagee in possession had not shown clearly that anything was due upon his mortgage, and the next estate, being a life-estate, was in danger of being lost by the delay, and the possible inability of the first mortgagee to refund if he shall be ordered to do so.(i) So, also, a receiver was appointed after decree in a case where the application could not have been made at the hearing.(k) So also, a receiver was appointed after decree in a case where it appeared by the report that the circumstances would at the hearing have entitled the party to a receiver.(l) So, also, a

(g) *Bowman v. Bell*, 14 L. J. Ch. N. S. 119; 14 Sim. 392; 175.

(i) *Hiles v. Moore*, 15 Beav. 29; 175.
Thomas v. Davies, 11 Beav. 29; (k) *Bainbridge v. Blair*, 4 L. J. Ch. N. S. 207
Wright v. Vernon, 3 Drew. 112.

(h) *Thomas v. Davies*, 11 Beav. 29.
 (l) *Att.-Gen. v. Mayor of Galway*, 1 Moll. 95, 104.

Bank, 1 Green, C. R. 173; and *Williams v. Monroe*, 3 Cal. 383. But the grounds for the appointment of a receiver need not be incorporated into the pleadings. It is enough if the latter disclose a case of the class in which receivers may be appointed and the special reasons therefor may be set out on a motion. *Hottenstein v. Conrad*, 9 Kan. 435. The pendency of a motion to amend the bill is no objection to a motion for the appointment of a receiver, provided the defect is not fatal, or does not render the bill demurrable. *Barnard v. Darling*, 1 Barb. C. R. 76.

receiver was appointed in a case where, after a decree for sale, the defendant by neglecting to bring in the deeds had prevented the plaintiff from obtaining the benefit of the decree.^(m) Unless, however, a special case be made out, the court will not appoint a receiver after decree, if the bill do not pray a receiver.⁽ⁿ⁾

The application for a receiver may be granted after decree, although it has been previously refused, if a state of facts entitling the party to a receiver be made to appear on the proceedings in the cause.^(o)

A receiver may be appointed after decree although by the decree further consideration generally,^(p) or the matters in question between the plaintiff and the particular defendant, have been reserved.^(q)

If no subsequent circumstances have occurred, rendering the appointment of a receiver necessary for the protection of the estate or otherwise, a receiver will not, it would seem, be appointed after decree.^(r)

It has been held in Ireland that after a decree taken *pro confesso*, the application for a receiver must be supported by an affidavit as to the sum due for principal, interest, and costs, after just allowances, and that the defendant is in possession.^(s)

^(m) *Shce v. Harris*, 1 J. & L. 91; See *Hackett v. Snow*, 10 Ir. Eq. 220. ^(q) *Cooke v. Gwynn*, 3 Atk. 689.

⁽ⁿ⁾ *Fallows v. Lord Dillon*, 1 W. R. 101. ^(r) *Wright v. Vernon*, 3 Drew. 121; see *Hackett v. Snow*, 10 Ir. Eq. 220.

^(o) *Att.-Gen. v. Mayor of Galway*, 1 Moll. 95, 104. ^(s) *Rogers v. Newton*, 2 Ir. Eq. 40.

^(p) *Hiles v. Moore*, 15 Beav. 175.

Receiver not appointed before hearing on motion founded on Evidence in the Cause.—Before the hearing of the cause, the court will not hear a motion for a receiver founded upon evidence which has been taken in the cause.(*t*)

When Application for Receiver may be made by Defendant.—After the decree, application for a receiver may be made by one defendant against a co-defendant ;(*u*) but before decree the application for a receiver cannot be made by a defendant.(*x*)¹ A motion by a defendant for a receiver made before decree, was held to be irregular, even in a case where one executor filed a bill against his co-executor, insisting that a receiver was necessary.² The plaintiff, though he had prayed for a receiver, refused to move for one.(*y*)

(*t*) *Lloyd v. Passingham*, 3 Mer. 697.

(*x*) *Robinson v. Hadley*, 11 Beav. 614.

(*u*) *Hiles v. Moore*, 15 Beav. 175.

(*y*) *Ib.*; see *Grote v. Bury*, 1 W. R. 92.

¹ To the same effect is *Leddel's Exr. v. Starr*, 4 C. E. Green, 159. By the New York Code receivers may be appointed on the application of either party. And now in England, in certain cases (as in partnership bills, for example), the defendant may apply for a receiver before judgment. *Sargant v. Read*, L. R. 1 Ch. D. 600.

² In *Henshaw v. Wells*, 9 Humph. 568, a bill was filed by a second mortgagee of one of two parcels of land against the mortgagor and the first mortgagee of both parcels. The bill prayed that a receiver might be appointed of the parcel mortgaged to the complainant. The first mortgagee asked that the receivership should embrace both parcels. It was objected on behalf of the mortgagor that a receiver could not be appointed upon the application of a co-defendant, but it was held that the application was proper under the circumstances, as both mortgagees were seeking relief.

At the hearing of a suit for redemption, the court would not, on the application of the defendant, grant a receiver against the plaintiff.(z) If a defendant requires a receiver against a plaintiff, he must, as a general rule, file a cross bill.(a) In cases where the application may be made by the defendant, it should be by petition.(b)

Affidavits.—The application for a receiver must be supported by evidence showing that the appointment is necessary.(c) If the application is made before decree, the affidavits must be founded on the allegations in the bill. If statements not founded on the allegations in the bill are introduced into the affidavits, the court will not attend to them.(d) Where the case made by the bill fails, it seems that the plaintiff will not be allowed to rely, as a ground for a receiver, upon the equity confessed by the answer.(e) If the application was made before answer, the practice formerly was that the plaintiff could rely on the admissions contained therein, and could not enter into evidence in opposition thereto; but now, upon any application for a receiver, or to discharge an order appointing a receiver, the answer of the defendant is for the purpose

(z) *Barlow v. Gains*, 8 Beav. 329.

(c) See *Middleton v. Dodswell*, 13 Ves. 269.

(a) *Robinson v. Hadley*, 11 Beav. 614; *Grote v. Bury*, 1 W. R. 92.

(d) *Dawson v. Yates*, 1 Beav. 306.

(b) *Barlow v. Gains*, 8 Beav. 329; *Hiles v. Moore*, 15 Beav. 175.

(e) *Cremen v. Hawkes*, 2 J. & L. 674.

of evidence on such application to be regarded merely as an affidavit of the defendant; and affidavits may be received and read in opposition thereto.^(f)¹

Nomination of Receiver.—The person who is to fill the office of receiver is generally selected in proceedings in the judge's chambers, but if both parties agree upon a proper person, the court will at once insert his name in the decree.^(g) Where, in consequence of the urgency of the case, an order was made for the appointment of a receiver *ex parte*, the plaintiff was appointed receiver.^(h)

If the person to be nominated receiver is not named in the order, the appointment is made in chambers. For this purpose a copy of the order is left there, and a summons to proceed thereon is issued and served on all parties interested in the usual manner.⁽ⁱ⁾ On the return of the summons, or at an adjournment thereof, the party having the conduct of the proceedings^(k)

^(f) 15 & 16 Vict., c. 86, s. 59. defendant, a mortgagee, was appointed receiver.

^(g) *Anderson v. Kemshead*, 16 Beav. 345; *Powys v. Blagrove*, 18 Jur. 464; *Ames v. Birkenhead Docks*, 20 Beav. 332; see *Ramsden v. Fairthorpe*, 1 N. R. 389.

⁽ⁱ⁾ Ord. XXXV. rr. 15, 16. See as to the form of the summons, 3 Dan. Ch. Pr. 1722.

^(h) *Rawson v. Rawson*, 11 L. T. N. S. 595. In *Davis v. Barrett*, 13 L. J. Ch. 304, the defendant, a mortgagee, was appointed receiver.

^(k) Where a receiver had been appointed in two administration suits, the carriage of the appointment was given to the plaintiff who first gave notice of motion. *Hart v. Tulk*, 6 Ha. 611.

¹ It is no objection to a motion for a receiver and to an order for the examination of the defendant on oath before the master in a creditor's suit, that an answer upon the oath of the defendant is waived by the bill. *Root v. Safford*, 2 Barb. C. R. 33.

brings into chambers evidence showing the nature and value of the property over which the receivership is to extend, and the fitness of the person proposed by him as receiver.(l)

If the party proposed as receiver is objectionable, any person interested in the proceedings may propose that some other person be appointed. A stranger to the suit cannot, it may be observed, propose a receiver.(m)¹ The proposal must come from a party interested.(n) The most fit person should be appointed without regard to the party by whom he has been proposed.(o) In making the selection, the circumstances of the case and the interests of all parties must be taken into consideration ;(p) but, other things being equal, that is, supposing the parties equally interested, and that the persons proposed on both sides are unobjectionable, the person proposed by the party having the conduct of the proceedings is usually preferred.(q) In the appointment of a receiver considera-

(l) Dan. Ch. Pr. 1574. See as to forms, 3 Ib. 1724-1726.

(m) *Att.-Gen. v. Day*, 2 Madd. 246.

(n) *Ib.*; *Bagot v. Bagot*, 2 Jur. 1063.

(o) *Lespinasse v. Bell*, 2 J. & W. 436.

(p) *Wood v. Hitchings*, 4 Jur. 858. If a married woman desires a receiver over her separate es-

tate, she may appoint whom she pleases. An affidavit by her husband that the person proposed by her is unfit, cannot be attended to. *Bagot v. Bagot*, 2 Jur. 1063.

(q) *Wilson v. Poe*, 1 Hog. 322; Dan. Ch. Pr. 1574; see *Baylies v. Baylies*, 1 Coll. 537; *Bord v. Tollemache*, 1 N. R. 177.

¹ See *Tyler v. Willis*, 33 Barb. 331.

ble attention will be given to the recommendations of a testator.(r)

If the estate be in mortgage, the preference will be given to the person proposed by the mortgagee, unless there is some substantial objection to him, though the person proposed by the mortgagor may be more experienced in the duties of the office. It was said to be an indulgence in the mortgagee to suffer the owner of the estate to appoint a receiver.(s)

A party to the cause may propose himself as receiver, if leave to that effect be given and embodied in the decree or order.(t) If leave to that effect be not embodied in the decree or order, a party to the suit cannot propose himself.(u) The judge in chambers can, however, give leave, if the question has not been disposed of in court. If the leave has been refused, a subsequent order to that effect can be obtained on summons at chambers.(x)

According to the old practice of the court, when the appointment of a receiver rested with the Masters, the settled rule and practice was not to entertain any objection to the report of the Master which was not

(r) *Wynne v. Lord Newborough*, 15 Ves. 283.

(s) *Wilkins v. Williams*, 3 Ves. 588; see *Bord v. Tolle-mache*, 1 N. R. 177, where the deed contained a provision for the appointment of a receiver by the first mortgagee, and the suit for the appointment of a receiver

was instituted by a second mortgagee

(t) *Meaden v. Sealey*, 6 Ha. 620; *Cookes v. Cookes*, 2 D. J. & S. 526; Set. on Decr. 1003.

(u) *Davis v. Duke of Marlborough*, 2 Sw. 118.

(x) Dan. Ch. Pr. 1568.

founded on principle.(y) The court would not interfere with the discretion of the Master in the appointment of a receiver, unless some substantial objection could be shown to the appointment.(z) Under the new practice the Court of Appeal acts precisely on the same principles which the court had acted on during the time when the old practice was in force, and will not entertain an application bringing in question the decision of the judge as to the most fit person to be appointed receiver, unless the appointment be open to some overwhelming objection in point of choice, or some objection fatal in point of principle.(a)¹

- (y) *Ley v. Ley*, 25 L. J. Ch. 600; *Cookes v. Cookes*, 2 D. J. & S. 530; see *Blakeway v. Blakeway*, 2 L. J. Ch. N. S. 75. *ersbank v. Colasseau*, 3 Ves. 164; *Anon.*, Ib. 515; *Tharp v. Tharp*, 12 Ves. 317.
- (z) *Creuze v. Bishop of London*, 2 Bro. C. C. 253; *Thomas v. Dawkin*, 1 Ves., Jr., 452; *Bow-* (a) *Ley v. Ley*, 25 L. J. Ch. 600; *Cookes v. Cookes*, 2 D. J. & S. 530.

¹ *In the matter of the Eagle Iron Works*, 8 Paige, C. R. 385, the rules on this subject were clearly stated by Chancellor Walworth in the following language: "Where it is referred to a Master to report a proper person to be appointed a receiver of the property of a defendant, or of a corporation, or the committee of an idiot or lunatic, and to approve of sureties to be given by such receiver or committee, the appointment is not complete until it is confirmed by a special order of the court. But where the Master is directed to appoint a receiver, and to take from him the requisite security, no order for the confirmation of the appointment is necessary. If either party is dissatisfied with the appointment made by the Master, the proper course is to present a petition to the court, upon due notice to all the other parties who have appeared and who are interested in the appointment, stating the grounds of objection to the receiver and praying that the Master may review his report. . . . The court will not disturb the decision of the Master appointing a receiver, merely

It is a substantial objection to the appointment of a receiver that he has an undue partiality for one of the parties ;(b) but if an order be made, without any objection on the part of any of the parties, by which liberty was given to one of the parties to propose himself as receiver, the question is one not of principle, but a question of discretion under all the circumstances of the case ; and if the judge appoints one of them as receiver, the Court of Appeal will not interfere with that discretion.(c) It is no objection to the appointment of a party to the suit as receiver, if leave to that effect has been given in the decree or order, that there may be disputes and differences between the parties.(d)

Where a receiver has been appointed, the court will not remove him on the mere ground of his being an illiterate person, unless some other reason can be given, such as mismanagement, dishonesty, or incompetency to manage the estate.(e)

Receiver on Bill pro confesso.—In pronouncing the decree, the court may either upon the case stated in

(b) *Blakeway v. Blakeway*, 2 L. J. Ch. N. S. 75. [See *Perry v. Oriental Hotels Co.*, L. R. 5 Ch. App. 420.]

(c) *Cookes v. Cookes*, 2 D. J. & S. 530.

(d) *Ib.*

(e) *Chaytor v. Maclean*, 11 L. T. 2.

because it may think he might have made a better selection among the several candidates proposed. To induce the court to interfere, the defendant must either show that the person appointed by the Master is legally disqualified, or that his situation is such as to induce a belief that the interests of the parties will not be properly attended to by him." The chancellor may appoint a receiver in the first instance, without previous reference to a Master. See *The Bank of Columbia v. The Att.-Gen.*, 3 Wend. 588.

the bill, or upon that case and a petition presented by the plaintiff for the purpose, as the case may require, order a receiver of the real and personal estate of the defendant against whom the bill has been ordered to be taken *pro confesso*, to be appointed with the usual directions.(f)

Where a bill is taken *pro confesso*, no proceeding is to be taken, and no receiver appointed under the decree; and no sequestrator under any sequestration issued in pursuance thereof, shall take possession of or in any manner intermeddle with any part of the real or personal estate of a defendant, and no other process is to issue to compel performance of the decree without leave of the court to be obtained on motion, with notice served on such defendant or his solicitor, unless the court dispense with such service.(g) The order, it may be observed, assumes that a receiver may be under the decree. The order is not that no proceeding shall be taken to appoint a receiver, but that no receiver appointed shall take possession.(h) Where, therefore, the appointment of a receiver has been directed, the chief clerk may appoint him without serving the defendant.(i)

What Security is required for a Receiver.—A person to be appointed receiver must, unless otherwise ordered, first give security,¹ to be allowed by the judge to whose

(f) Ord. XXII. r. 9.

(g) Ord. XXII. r. 13.

(h) *Dresser v. Morton*, 2 Ph.

285.

(i) *Ib.*

¹ See *Williamson v. Wilson*, 1 Bland, 422; *Tomlinson v. Ward*, 2 Connecticut, 396; *Colemore v. North*, 27 L. T. Rep. (N. S.) 405.

court the cause is attached, duly to account for what he shall receive on account of the rents and profits for the receipt of which he is to be appointed, at such periods as the judge shall appoint, and to account for and pay the same as the court shall direct, or as the case may be, to be answerable for what he shall receive in respect of the personal estate, for the getting in and collection of which he is to be appointed, and to account for and pay the same respectively, as the court shall direct.^(k)

The security usually required is the recognizance of the receiver, with two or more sureties.^(l) The recognizance is given to the Master of the Rolls and senior Vice-Chancellor for the time being,^(m) and must be taken before a person authorized to administer oaths in Chancery.⁽ⁿ⁾ It is usually for double the amount of the annual rental or yearly value of the estate to be collected.^(o) Where debts or outstanding estate are to be got in, security is given to the full, or something beyond the full amount which is ordered or expected to be received.^(p) With the view of reducing the amount of the recognizance, part of the estate may be ordered to be paid into court for safe custody, and security be required only for the rest.^(q) With

(k) Ord. XXIV. r. 1.

(o) Set. on Decr. 1007.

(l) *Mead v. Lord Orrery*, 3 Atk. 237; Set. on Decr. 1007; see *Re Ward*, 31 Beav. 1.

(p) Fisher on Mortg. 1, p. 405.

(q) *Poole v. Ward*, Set. on Decr. 1007; *Ex parte Clayton*, 1

(m) Ord. XLII. r. 13.

Russ. 476; see *Re Eagle*, 2 Ph.

(n) Ord. XXIV. r. 1; see Dan. 201.

Ch. Pr. 686.

the same view the receiver may also be restricted from getting in mortgage debts.(r)

It is not regular to take as security for a receiver an assignment of a mortgage belonging to him,(s) or the bond of an incorporated guarantee association,(t) instead of the usual security. A transfer of government stock has, however, been accepted as security for a receiver.(u)

Where a person resident in Ireland is appointed receiver by the court here, the security taken is a judgment confessed by him and his sureties in the Court of Queen's Bench there in favor of the Master of the Rolls and senior Vice-Chancellor here, and such judgment is duly docketed and registered there so as to give a lien on the real estates of the receiver and sureties.(x)

The sureties must be persons resident in England, even where the property to be collected is out of the country.(y)

Where the property of which a receiver has been appointed has increased in value during the receivership, additional security has been required to be given by him.(z) Upon any event, such as death or bankruptcy, happening which would prevent the recognition being effectually put in force against them, an

(r) Fisher on Mortg. 1, p. 405.

(u) *Betagh v. Concannon*,

(s) *Mead v. Lord Orrery*, 3 Atk. 237.

Smith on Rec. p. 17.

(x) Set. on Decr. 1007.

(t) *Manners v. Furze*, 11 Beav. 30.

(y) *Cockburn v. Raphael*, 2 Sim. & St. 453.

(z) Dan. Ch. Pr. 1573.

order will be made at chambers on summons directing the receiver to give a new security.(a)

The court will not dispense with the usual security, even with the consent of the parties interested.(b) But if the parties interested are competent to assent and agree to appoint a receiver of their own authority, and not by the authority of the court, the court may allow him to act even without recognizance.(c) In a case where a testator had by his will appointed a receiver, stating that he intended by the appointment to give him a pecuniary benefit, he was appointed receiver on his own personal recognizance;(d) and even in a case where all the parties were not competent to consent, the circumstance that the receiver had been employed by the testator to manage the estate was held to be a reason for dispensing with sureties and appointing him receiver on his own personal recognizance.(e) In a late case, however, the court would not dispense with the usual security, some of the parties being not *sui juris*, and therefore incapable of giving consent.(f)

It is not unusual, where no salary is given to the receiver, to dispense with the security.(g)

Where the person proposed as receiver, has been

(a) Set. on Decr. 1019.

(e) *Carlisle v. Berkeley*, Amb.

(b) *Manners v. Furze*, 11 Beav. 599; see *Wilson v. Wilson*, 11 Jur. 793.

(c) *Manners v. Furze*, 11 Beav. 30.
(f) *Tylee v. Tylee*, 17 Beav. 31; see *Bainbrigge v. Blair*, 3 Beav. 424.

(g) *Gardner v. Blane*, 1 Ha.

(d) *Hibbert v. Hibbert*, 3 Mer. 381.
681.

chosen, the amount of his security will be fixed, and the persons proposed to be his sureties approved. The partners in trade of the receiver, persons in partnership together, and the solicitor in the cause, are usually rejected as sureties for a receiver.(h)

Recognizance of Receiver and Sureties.—After the approval of the person proposed as receiver and the persons proposed as his sureties, the receiver's solicitor prepares the draft recognizance, and engrosses it after it has been settled by the Chief Clerk.(i) The recognizance must then be taken before some person authorized to administer oaths in Chancery;(k) and each surety must also make an affidavit that he is worth the amount for which he is bound after payment of all his just debts.(l) If any doubt as to the sufficiency or solvency of the surety exist, the opposing solicitor has a right to attend at the time appointed for acknowledging the recognizance, and examine the sureties on these points.(m)

The recognizance and an office copy of the affidavit of the sureties having been left at chambers, a memorandum of the allowance of the recognizance is written in the margin of the recognizance, and signed by the Chief Clerk.(n)

(h) Dan. Ch. Pr. 1575.

(m) Smith on Rec. 18.

(i) Ib.; Smith Ch. Pr. 1028.

(n) Dan. Ch. Pr. 1575. See as

(k) Dan. Ch. Pr. 1575.

to form of memorandum, 3 Ib.

(l) Ib.; see as to form of affi-

1323, 1727.

davit, 3 Ib. 1728.

The recognizance is then sent from the chambers to the enrolment office in Chancery, and a receipt taken for it from the Clerk of Enrolments.(o) The recognizance must be enrolled within six months from the acknowledgment thereof;(p) but under special circumstances leave may be had from the court to enrol it *nunc pro tunc*;(q) though not, it would seem, to the prejudice of intervening incumbrancers.(r)

The appointment of a receiver is not, however, completed by the enrolment of the recognizance. A further order must be made at chambers, appointing the person approved at chambers receiver pursuant to the order, and fixing the periods at which he is to pass his accounts and pay the balances due from him thereon.(s) To obtain this order a further summons which is issued and served in the ordinary manner is usually necessary.(t) The order is drawn up by the Registrar in the usual manner, and completes the appointment.(u)¹

Completion of Appointment of Receiver.—When the receiver is named in the order made on the application

(o) Dan. Ch. Pr. 1575; Smith Ch. Pr. 1029.

(p) Ord. XLII. r. 12.

(q) *Ib.*; *Vaughan v. Vaughan*, 1 Dick. 90.

(r) *Bothomly v. Fairfax*, 1 P. W. 340; *Blois v. Betts*, 1 Dick. 336; Set. on Decr. 1007.

(s) Dan. Ch. Pr. 1576; Smith Ch. Pr. 1030; see as to forms, 3

Dan. Ch. Pr. 1733; Set. on Decr. 1003.

(t) Dan. Ch. Pr. 1576.

(u) Smith Ch. Pr. 1030; see as to forms, Set. on Decr. 1003.

¹ See *The People v. The Central City Bank*, 53 Barb. 412.

to appoint a receiver, his appointment is usually made conditionally upon his giving security. A copy of the order is left at chambers, and a summons to settle the security is issued and served on the parties interested ;(x) and thereupon the amount of the security to be given will be settled upon the like evidence, and the recognizance will be approved, completed, and enrolled in the manner before described.(y) The Chief Clerk will then issue a certificate that security has been given, and this, when adopted by the judge and filed, completes the appointment,(z) and no further order is necessary.(a)

On an application at chambers to appoint a receiver, the expense of a certificate in addition to an order may be saved by the recognizance being completed and enrolled before an order is drawn up. In such case the recognizance should recite that the judge has approved the proposed receiver subject to his giving security, instead of reciting the order directing a receiver to be appointed ; and the order should, after reciting that the recognizance has been enrolled, appoint a receiver and fix the days for him to bring in his accounts and pay the balance.(b)

The costs incurred with reference to the completion of the security of the receiver and subsequent thereto,

(x) Dan. Ch. Pr. 1576 ; see as to form, 3 Ib. 1730.

(y) *Supra*, p. 164, 165 ; Dan. Ch. Pr. 1576.

(z) See as to form of certificate, 3 Dan. Ch. Pr. 1731 ; Set. on

Decr. 1004.

(a) Set. on Decr. 1004.

(b) Dan. Ch. Pr. 1576.

are in the first instance paid by the receiver, and will be allowed him in passing his first account.^(c)¹

(c) *Ib.*; see as to costs where an ignorant person had been induced by the misrepresentations of the plaintiff to consent to act as receiver, and afterwards, on discovering the nature of the office, refused to enter into the recognizance, *Hunter v. Pring*, 8 Ir. Eq. 102.

¹ See Appendix for forms of orders appointing receivers, and directing them in the management of the estate. See, also, 3 Dan. Chan. Prac. 2336-2346 (3d Am. ed.).

CHAPTER VI.

EFFECT OF THE APPOINTMENT OF AND POSSESSION OF A RECEIVER.

Parties to the Suit removed from Possession.—In appointing a receiver the Court of Chancery takes possession of the property, over which the receiver is appointed, by the hands of its officer.¹ A receiver duly appointed by the Court of Chancery is, from the

¹ *Battle v. Davis*, 66 North Carol. 252. It is not necessary in any case for the receiver to put himself in a situation where he is not entitled to the full protection of the court; as he is under no obligation to attempt to take property out of the possession of a third person, or even out of the possession of the defendant himself, by force, and without an express order of the court directing him to do so. The proper course is for the receiver to call upon the Master to decide, upon the examination of the defendant, and on the evidence before him, what property legally or equitably belonging to the defendant and to which the receiver is entitled under the order of the court, is in the possession of the defendant or under his power and control. And it is the duty of the Master to direct the defendant to deliver over to the receiver the actual possession of all such property in such manner and within such time as the Master may think reasonable. See *Parker v. Browning*, 8 Paige, C. R. 388; also *Browning v. Bettis*, 8 Id. 568; and *Yeager v. Wallace*, 44 Penna. St. R. 296. The receiver's right to the possession of the property is limited to the jurisdiction in which he is appointed; he cannot recover in a foreign jurisdiction. *Booth v. Clark*, 17 Howard, 322; *Hunt v. The Columbian Insurance Company*, 55 Maine, 290; *Harvey v. Varney*, 104 Mass. 436-443; *infra*, Chap. VII., note as to Actions by Receivers. Where, however, the title to the property becomes vested in the receiver, either by conveyance from the defendant or by the terms of the order, it may be asserted in a foreign jurisdiction. See note to Chap. VII., as to Actions by Receivers.

date of his appointment, an officer and representative of the court,^(a)¹ but he is not legally clothed with that character, nor able to perform its duties, until his recognizances are perfected.^(b)²

Parties removed from Possession by the Appointment.
—The effect of the appointment of a receiver is to remove the parties to the suit from the possession of the property.³ If at the time a receiver is appointed, a party claiming a right in the same subject-matter, under a title paramount to that under which the receiver is appointed, is in possession of the right which

(a) *Angel v. Smith*, 9 Ves. (b) *Wickens v. Townsend*, 1 391; *Owen v. Homen*, 4 H. L. R. & M. 361; *Defries v. Creed*, 335; *Aston v. Heron*, 2 M. & K. 34 L. J. Ch. 607.
1032.

¹ *Beverley v. Brooke*, 4 Grattan, 208; *Lafayette Bank v. Buckingham*, 12 Ohio St. R. 425. The order appointing a receiver may, for certain purposes, relate back to the time of the decision directing such an order, so as to give the court control over the subject-matter as for that time. *Smith v. The New York Stage Co.*, 18 Abb. Pr. R. 420; 28 How. Pr. R. 377; *Deming v. The New York Marble Co.*, 12 Abb. Pr. R. 66. But it cannot relate back as against third persons; *The Artisan's Bank v. Treadwell*, 34 Barb. 559.

² See *In the matter of the Eagle Iron Works*, 8 Paige, C. R. 385; *ante*, p. 158; and *Noyes v. Rich*, 52 Maine, 116.

Where there is a conflict between two receivers appointed by different judges, the court, in order to determine the question of priority, will inquire into fractions of a day. *The People v. The Bank*, 53 Barb. 412. The receiver of the party who obtained the first judicial action, the first service of papers, the first granting of the order for the appointment of a receiver, and the first perfecting of the appointment by the execution, approval, and filing of the required bond, takes precedence of the receiver of the other party, who was merely the first to take actual possession of the assets of the bank. *Id.* See also *Gelpeke v. Mil. & Hor. R. R. Co.*, 11 Wisconsin, 457.

³ *Noonan v. McNab*, 30 Wis. 277.

he claims, the appointment of the receiver leaves him in possession,(c) but parties to the suit, who are not in possession under a paramount title, are removed from possession by the appointment of a receiver. If a party to the suit be appointed receiver, the same rule obtains. In a case where the chairman of the trustees of a dock company was appointed receiver of the tolls, it was held that he had removed the trustees from the possession and receipt of the tolls.(d)

When sequestrators are in possession of lands or tenements in question in the cause, the appointment of a receiver of the rents and profits of those lands will have the effect of discharging the sequestration.(e) So, also, the appointment of a receiver in a suit was held to put an end to the power of a trustee appointed for the benefit of creditors to collect the rents.(f)¹

Right not affected by the Appointment.—The appointment of a receiver, however, does not in any way affect the right to the property.² The Court of Chan-

(c) *Evelyn v. Lewis*, 3 Ha. 472. (e) *Shaw v. Wright*, 3 Ves. 22, 24; *Reeves v. Cox*, 13 Ir. Eq.

(d) *Ames v. Birkenhead Docks*, 247.

20 Beav. 350.

(f) *McDonnell v. White*, 11 H. L. 570.

¹ The title of a receiver of a National Bank, under the Act of Congress of June 3, 1864, is paramount to that of an attaching creditor, although the attachment be laid upon the property of the bank before the appointment of a receiver. *National Bank v. Colby*, 21 Wal. 609.

² The appointment of a receiver over property of a corporation is not a dissolution of the corporation. *Kincaid v. Dwinelle*, 59 New York, 548. It may, however, in the case of moneyed corporations

cery in a suit for a receiver deals with the possession only, until the right can be determined, if the right be the subject-matter in dispute between the parties, or until the incumbrances have been cleared off, if the appointment has been made at the suit of an incumbrancer. Where the right is the subject-matter in dispute, the receiver merely holds the property for whosoever may ultimately appear to be entitled to it. If the appointment has been made on the application of an incumbrancer, the court restores the possession to him from whom it was taken, after the charge has been cleared off. The title is in no way prejudiced in theory or principle by the appointment.^(g) In *Gresley v. Adderley*,^(h) a receiver was appointed to keep down the interest of the incumbrances affecting the estates of a minor; and a mortgagee of a term of 100 years, which expired shortly after the appointment of the receiver, having applied for payment of the charge out of the rents so received, was refused, on the ground that when the court interposed to receive the rents beyond what was required for keeping down the

(g) *Sharp v. Carter*, 3 P. W. 379; *Skip v. Harwood*, 3 Atk. 564; *Boehm v. Wood*, T. & R. 345; *Lewis v. Lord Zouche*, 2 Sim. 392; *Portman v. Mill*, 8 L. J. Ch. N. S. 165; *Re Butler*, 13 Ir. Ch. 456. Where an order for the discharge of a receiver has been made, and he continues in possession after the date of his discharge, his possession is the possession of the party entitled: *Horlock v. Smith*, 11 L. J. Ch. 157.
(h) 1 Sw. 573.

virtually operate as a dissolution. *Bank Commissioners v. Bank of Buffalo*, 6 Paige, 497; *Verplanck v. Mercantile Insurance Co.*, 2 Paige, 438.

interest on incumbrances, all the surplus rents after payment of interest were received for the benefit of the heir. The same principle was acted on in *Thomas v. Brigstocke*,⁽ⁱ⁾ where a mortgagee petitioned to be paid the rents of the mortgaged premises which had been paid into court by a receiver in a suit to which the mortgagee was no party, he having given notice to the tenants not to pay their rents, it was held that his notice to the tenants could not divest the possession of the receiver which was the possession of those who claimed under the will of the mortgagor. So, also, the appointment of a receiver will not prevent the operation of the Statute of Limitations against the rightful owner out of possession not being a party to the suit;^(k) or interrupt the possession of a stranger so as to prevent the Statute of Limitations conferring a title on him.^(l)

The possession of the court by its receiver is the possession of all parties to the suit according to their

(i) 4 Russ. 65.

401; 8 Ir. C. L. 432. See as to

(k) *Harrison v. Duignan*, 2 Dr. & War. 295. Comp. *Wrixon v. Vize*, 3 Dr. & War. 123.

payment by a receiver taking the demand out of the Statute of Limitations, *Whitely v. Lowe*, 25

(l) *Groom v. Blake*, 6 Ir. C. L.

Beav. 421; 2 D. & J. 704.

¹ See, also, in this connection, *Montgomery v. Merrill*, 18 Mich. 338. When the property consists of commercial paper, the receiver does not stand in the position of a *bona fide* holder for value, for he acquires title by legal process and not in the regular course of mercantile dealing. *Briggs v. Merrill*, 58 Barb. 399.

A railroad corporation is not relieved from the responsibilities imposed upon it by its charter, because of the appointment of a receiver over a portion of the road. *Railroad Co. v. Brown*, 17 Wal. 450.

titles.(m) The appointment of a receiver is not for the benefit of the plaintiff merely, but for all other persons who may establish rights in the cause. Moneys in the hands of a receiver are *in custodia legis* for whoever can make title thereto.(n)¹ The appointment of a receiver, however, is for the benefit of incumbrancers only so far as expressed to be for their benefit and as they choose to avail themselves of it.(o) If a mortgagee claiming under a title paramount to that under which the receiver was appointed suffers the receiver to pay away the surplus rents to the beneficial owner, or to apply them for purposes other than the satisfaction of his security, he is not entitled to a retrospective account of rents and profits.(p)

(m) *Re Butler*, 13 Ir. Ch. 456; accordingly: *Seymour v. Vernon*, *Bertrand v. Davies*, 31 Beav. 19 L. T. 58.
436.

(n) *Delaney v. Mansfield*, 1 579; *Salt v. Lord Donegal*, Ll. Hog. 235. Where a receiver is & G. temp. Sng. 91. *Comp. Piddock v. Boulton*, 16 L. T. N. S. 837.

must be taken to be for the benefit of all parties who, in the result of the decision, should prove to be parties really interested, and the outgoings must be borne
(p) *Gresley v. Adderley*, 1 Sw. 576; see *Thomas v. Brigstocke*, 4 Russ. 64; *Flight v. Camac*, 4 W. R. 664.

¹ See *State Bank v. The Receivers*, 2 Green, C. R. 273; *Green v. Bostwick*, 1 Sandf. C. R. 185. A receiver who is ordered to pay over money cannot set off his individual claims against the party to whom he is directed to make the payment. *Johnson v. Gunter*, 6 Bush (Ky.), 534. No discretion is allowed him as to the disposition of the fund. He holds it subject to the order of the court, and to be paid to whom the court shall adjudge it. *Id.* The circumstance that a receiver is afterwards made trustee of the same fund in insolvent proceedings, does not take away the authority of the court, by which he was appointed receiver, over the fund. *Henry v. Kaufman*, 24 Maryl. 1.

Incumbrancers may or may not avail themselves of the order by applying to the receiver. If they apply to him, they will be paid their interest, or if he refuses or neglects to pay them, they may complain to the court of such neglect or refusal; but if they neglect to apply for the interest, it is to be presumed that they are satisfied with the security they have both for interest and principal.^(q) The direction given by the court to the receiver to keep down the interest of the incumbrances, has not the effect of an appropriation of the rents and profits to that specific purpose. It is given without the least view to the interests of the real and personal representatives. It is given partly in justice to the incumbrancers, that they may not be injured by the act of the court in taking possession of the rents and profits to which they had a right to resort for payment of their interests, partly for the benefit of the estate itself, lest the incumbrancers, having their interest stopped, might be induced to resort to proceedings injurious to those who stand behind them.^(r)

Receiver considered as Agent of Party entitled.—When the party entitled to an estate over which a receiver has been appointed is ascertained, the receiver

^(q) *Bertie v. Lord Abingdon*, *Camac*, 4 W. R. 664. Comp. 3 Mer. 567. Comp. *Piddock v. Piddock v. Boulbee*, 16 L. T. Boulbee, 16 L. T. N. S. 837. N. S. 837.

^(r) 3 Mer. 567; see *Flight v.*

will be considered as his receiver.(s)¹ Where accordingly a receiver was appointed in a suit for specific performance at the suit of a vendor, and the purchaser was compelled to accept the title, it was held that the receiver must be considered as his receiver.(t) In a case, however, where a receiver had been appointed in consequence of the inability of the vendor of an estate, sold under a decree, to make out his title, the court was of opinion that the expenses of a receiver ought not to be borne by the purchaser, and directed that they should be repaid to him out of a fund in court, together with the costs of the application.(u)

Loss arising from Default of Solicitor must be borne by the Estate.—A receiver appointed by the court, being appointed on behalf and for the benefit of all persons interested, parties to the suit,(v) if a loss arises from the default of a receiver appointed by the court, the estate must bear it as between the parties to the suit.(x)

(s) *Boehm v. Wood, T. & R.* 345; *Re Butler*, 13 Ir. Ch. 456; see *Rigge v. Bowater*, 3 Bro. C. C. 365.

(t) *Boehm v. Wood, T. & R.* 345; see *Re Butler*, 13 Ir. Ch. 456.

(u) *McCleod v. Phelps*, 2 Jur. 962.

(v) *Davis v. Duke of Marlborough*, 2 Sw. 118; *Bainbrigge v. Blair*, 3 Beav. 421; *Bertrand v. Davies*, 31 Beav. 436; *Fraser v. Burgess*, 13 Moo. P. C. 314; see *Neate v. Pink*, 3 Mac. & G. 476.

(x) *Hutchinson v. Massareene*, 2 Ba. & Be. 55.

¹ *Ellicott v. Warford*, 4 Maryl. 85; *Ellicott v. U. S. Ins. Co.*, 7 Gill, 307; *Field v. Jones*, 11 Georgia, 416; *State Bank v. The Receivers*, 2 Green, C. R. 266.

Rents, &c., bound from Date of Appointment.—The rents and profits of the estate over which a receiver has been appointed are, as far as respects parties to the suit, bound from the date of the order for the appointment.^(y)¹ If a solicitor in the cause has received rents without the authority of the court, he must pay them over to the receiver appointed therein, although he may not have been actually clothed with the character of receiver at the time the rents were received. The solicitor cannot be permitted to set up a lien on them for his costs.^(z)

If the tenant for life of a mortgaged estate with power to lease, exercise the power pending a foreclosure suit, and after the appointment of a receiver, the lessees are considered, as against prior incumbrancers, as tenants from year to year to the receivers.^(a)

The order appointing a receiver is, however, an order for the benefit of the parties to the suit.^(b) The order on tenants to pay their rents to the receiver attaches all rents in their hands unpaid at the time of service.

^(y) *Lloyd v. Mason*, 2 M. & C. 487; *Davenport v. Moss*, 14 W. R. 453.

1 Beav. 520.

^(a) *Lord Mansfield v. Hamil-*

^(z) *Wickens v. Townsend*, 1 ton, 2 Sch. & Lef. 28.

R. & M. 361. The retainer of his debt by an executor against a receiver appointed by the court ^(b) *Defries v. Creed*, 34 L. J. Ch. 607.

¹ The title of a receiver appointed over choses in action alleged to be fraudulently assigned dates from the filing of the bill, and the debtor in the chose in action cannot set off a cross judgment obtained by him since that date. *Clark v. Brockway*, 1 Abb. App. Dec. 351.

As to rents which have been paid by them prior to the service, they are not answerable.(c)

Interference by Third Parties with the Possession of the Receiver.—When the court has appointed a receiver and the receiver is in possession, his possession is the possession of the court, and may not be disturbed without the leave of the court.(d)¹ Where the court has taken possession of property by its receiver, if any one, whoever he be, disturb the possession of the receiver, it holds that person as guilty of a contempt of court, and liable to be imprisoned for that contempt.(e)² The court will not allow the possession of

(c) *Daly v. Blake*, cit. *Smith kenhead Docks*, 20 Beav. 353 ; on Rec. 27. *Defries v. Creed*, 34 L. J. Ch.

(d) *Angel v. Smith*, 9 Ves. 607.
335 ; *Hutchinson v. Massareene*, (e) *Fripp v. Bridgewater, &c.*,
2 Ba. & Be. 55 ; *Aston v. Heron*, *Railway Co.*, 3 W. R. 356 ;
2 M. & K. 391 ; *Ames v. Bir-* *Lane v. Sterne*, 3 Giff. 629.

¹ The court will not permit this possession to be disturbed by an execution. *Robinson v. The Atlantic and Great Western Railway Co.*, 66 Penna. St. R. 160 ; *Albany City Bank v. Schermerhorn*, 9 Paige, C. R. 372 ; *Wiswall v. Sampson*, 14 Howard, 52. See also *National Bank v. Colby*, 21 Wal. 609.

² An assignee in bankruptcy is so liable. *Clark v. Bininger*, 9 Am. Law Reg. (N. S.) 304 ; *Watkins v. Pinkney*, 3 Edw. C. R. 533 (and see *Davis v. Alabama and Florida R. R. Co.*, 13 Nat. Bank Reg. 258 ; S. C., 1 Woods, 661). And so is a landlord distraining for rent. *Noe v. Gibson*, 7 Paige, C. R. 513 ; and see the *Matter of Merritt*, 5 Id. 131 ; *In the matter of Cohen and Jones*, 5 Cal. 494 ; *Parker v. Browning*, 8 Paige, C. R. 388. But the defendant in a creditor's bill is not liable to process for contempt for refusing to deliver to the receiver property claimed by a third party, in the absence of a decision by the master (to whom the cause was referred for the purpose of appointing a receiver), that the defendant had

its receiver to be interfered with or disturbed by any one, whether claiming paramount to or under the right which the receiver was appointed to protect.^(f)¹ A man who thinks he has a right paramount to that of the receiver, must, before he presumes to take any steps of his own motion, apply to the court for leave

(f) *Evelyn v. Lewis*, 3 Ha. *glian Railway Co.*, 3 Mac. & G. 475; *Wadmore v. Trevanion*, 114. cit. 1b. 473; *Russel v. East An-*

such a control and possession of the goods as to entitle the receiver to a delivery thereof without the consent of the claimant. *Cassilear v. Simons*, 8 Paige, C. R. 273. And the rights of a receiver appointed by a State Court under an attachment by mesne process, are subordinate to those of an assignee in bankruptcy, the effect of the bankrupt proceedings having been that the mesne process of the State Court was dissolved. *Miller v. Bowles*, 10 Nat. B. R. 515 (see *Miller v. Bowles*, 58 N. Y. 253). See also *In re Whipple*, 8 Chicago Leg. N. 134.

¹ But if the property is in possession of a third person who claims the right to retain it, the receiver must either proceed by suit in the ordinary way to try his right to it, or the complainant should make such third person a party to the suit, and apply to have the receivership extended to the property in his hands; so that an order for the delivery of the property may be made which will be binding upon him, and which may be enforced by process of contempt if it is not obeyed. *Parker v. Browning*, 8 Paige, 388, 390. Hence it has been ruled in a foreclosure suit, that the assignee of the equity of redemption who has not been made a party to the suit was not liable to process for contempt for collecting the rents of the mortgaged premises after a receiver had been appointed. *Bowery Savings Bank v. Richards*, 3 Hun, 366; see further on this subject, *The Vermont and Canada R. R. Co. v. The Vermont Central R. R. Co.*, 46 Verm. 792. A court will not interfere with the possession of a receiver duly appointed by another court of competent jurisdiction. *The Milwaukee and St. Paul's R. R. Co. v. The Milwaukee and Minnesota R. R. Co.*, 20 Wisconsin, 165; and note to page 13, *ante*.

to assert his right against the receiver.(g) A receiver, indeed, appointed to get in property, part of which he finds in the possession of another receiver, ought not to take proceedings to deprive the latter of such possession without the authority of the court. He, or the parties at whose instance he was appointed, should ask for the direction of the court how to proceed.(h)

It is immaterial that the order appointing a receiver may have been improper or erroneous. It is not competent for any one to interfere with the possession of a receiver on the ground that the order appointing him ought not to have been made. It is enough that it be a subsisting order. Parties who feel aggrieved by an order of the court must take a proper course to question its validity, but while it lasts it must be obeyed.(i)¹

The court requires and insists that applications should be made to it for permission to take possession of any property of which the receiver has taken, or is directed to take, possession. The rule is not confined to property actually in the hands of a receiver. The

(g) *Ib. Hawkins v. Gathercole*, 1 Drew, 17; *Randfield v. Railway Co.*, 3 Mac. & G. 117; *Randfield*, 1 Dr. & Sm. 314. (i) *Russell v. East Anglian*
Ames v. Birkenhead Docks, 20
 (h) *Ward v. Swift*, 6 Ha. 312. Beav. 353.

¹ The debtors of a National Bank, when sued by a receiver appointed under the Act of Congress, cannot inquire into the legality of his appointment. It is sufficient for the purposes of such a suit that he has been appointed and is receiver in fact. As to debtors, the action of the comptroller in making the appointment is conclusive until set aside on the application of the bank. *Cadle v. Baker*, 20 Wal. 650. See also *In the matter of Day*, 34 Wisc. 638.

court will not permit any one, without its sanction and authority, to intercept or prevent payment to the receiver of any property which he has been appointed to receive, though it may not be actually in his hands.^(k)¹ The possession of a receiver appointed over an estate is not affected by notice given by a mortgagee who alleges that his title is prior to that under which the receiver claims to the tenants to pay their rents to him.^(l)

A receiver appointed by the Court of Chancery cannot, on the ground that his appointment has been improper, be called upon to interplead in a court of law; but he may, if summoned, appear for the purpose of asserting his right, and denying the right of any other court to interfere with his possession.^(m)

If a receiver improperly submit to an order made by a court of law, and pay money in his hands contrary

(k) *Ames v. Birkenhead*
Docks, 20 Beav. 353.

(m) *Russell v. East Anglian*
Railway Co., 3 Mac. & G. 115,

(l) *Thomas v. Brigstocke*, 4 Russ. 64.

¹ But the decree of a Court of Chancery appointing a receiver, entitles him to its protection only in the possession of property which he is authorized or directed by the decree to take possession of. When he assumes to take or hold possession of property not embraced in the decree appointing him, and to which the debtor never had any title, he is not acting as the representative or officer of the Court of Chancery, but is a mere trespasser, and the rightful owner of the property may sue him in any appropriate form of action for damages, or to recover possession of the property illegally taken or detained. *Hills v. Parker*, 111 Mass. 508. The same rule has also been applied to an assignee in bankruptcy. See *Leighton v. Harwood*, 111 Mass. 67.

to the order of the court, the person to whom it has been paid will be ordered to repay it, and the receiver may be liable to pay the costs of the motion. The court never allows any person to interfere either with money or property in the hands of its receiver without leave, whether it is done by the consent or submission of the receiver, or by compulsory process against him. All moneys which come to the hands of a receiver by the order of the court, enabling him to receive, and entitling him to give a good discharge to the persons paying them, are moneys belonging to the Court of Chancery, and the receiver can only discharge himself by paying them in obedience to the direction and order of the court. A judgment-creditor cannot, without leave, attach under a garnishee order under the Common Law Procedure Act, 1854, moneys in the hands of a receiver which have been directed to be paid by him to the judgment-debtor.⁽ⁿ⁾¹ It is not necessary to wait for the passing of a receiver's accounts before applying to the court to prevent him from misapplying moneys in his hands.^(o)

What constitutes Disturbance of a Receiver.—The rule that the possession of a receiver may not be disturbed without leave, does not, however, apply, as far at least

(n) *De Winton v. Mayor, &c. of Brecon*, 28 Beav. 200, 203.

(o) *Ib.*

¹ See *Field v. Jones*, 11 Georgia, 417; *Taylor v. Gillean*, 23 Tex. 508; *Skinner v. Maxwell*, 68 North Carol. 404; *Martin v. Davis*, 21 Iowa, 535; *Glenn v. Gill*, 2 Maryl. 1.

as third parties are concerned, until a receiver has been actually appointed, and is in actual possession. It is not enough that an order has been made directing the appointment of a receiver. Until the appointment has been perfected, and the receiver is actually in possession, a creditor is not debarred from proceeding to execution.¹ The order appointing a receiver is for the benefit of parties to the suit.² It does not affect third parties until the appointment is completed and perfected.(p)³

Nor is there disturbance of a receiver unless the order for the appointment of a receiver states so distinctly on the face of it, over what property the receiver is appointed, that it may be known what is the property that he is in possession of.(q) Hence, where a receiver was appointed "of the income of the outstanding trust property in the pleadings mentioned," and the receiver entered into and remained in posses-

(p) *Defries v. Creed*, 34 L. J. Ch. 607. (q) *Crow v. Wood*, 13 Beav. 271.

¹ *Davenport v. Kelly*, 42 New York, 193; *Rankin v. Harwood*, 2 Phillips, 22; *Ellicott v. The United States Ins. Co.*, 7 Gill, 307; *Waring v. Robinson*, Hoffman's C. R. 524; *Van Alstyne v. Cook*, 25 New York, 489; *Becker v. Torrance*, 31 New York, 631. See also in this connection, *Pessenden v. Woods*, 3 Bosw. 550.

² *Howell v. Ripley*, 10 Paige, C. R. 46.

³ In *The Albany City Bank v. Schermerhorn*, 9 Paige, 372, proceedings for contempt were instituted against two sheriffs for levying upon certain property. The sheriffs were held not to be in contempt, as it appeared ultimately that the possession of the receiver had not been actually disturbed. (See 10 Paige, C. R. 263.) But the doctrine laid down by the court was substantially the same as that stated in the text.

sion of the real estate for several years, and the tenants attorned to him, an application to restrain the legal owner from proceeding against the tenants without the leave of the court was refused with costs. The appointment should have been over the rents of the particular property, and should have been followed by a direction to the owner to deliver possession, or that the tenants should attorn.(r)

To constitute disturbance of a receiver, it is not necessary that the party complained of should be about to turn him out of possession. The court will not allow the first step to be taken in an action of ejectment against a receiver by any party, without an application having been first made to the court for permission to do so.(s)

Parties who claim under a Right paramount to the Receiver must apply to the Court.—If at the time a receiver is appointed, a party claiming a right in the same subject-matter is in possession of the right which he claims, the appointment of the receiver leaves him in the possession of the right, and does not interfere with the exercise of it.(t) If, on the other hand, the claimant was out of possession, he must apply to the court before he institutes any legal proceedings affecting the possession which the receiver has acquired.(u) The rule applies even to cases where the receiver has

(r) *Ib.*; *supra*, p. 14. 573; *Evelyn v. Lewis*, 3 Ha.

(s) *Hawkins v. Gathercole*, 1 472.

Drew. 18. (u) *Evelyn v. Lewis*, 3 Ha.

(t) *Johnes v. Claughton*, Jac. 472.

been appointed without prejudice to the right of persons having prior charges.(x) The rule applies to cases where a receiver has been appointed over the estate of a tenant in possession. The appointment of a receiver as against the estate of a tenant does not affect the rights of the landlord, but he will not be permitted to exercise those rights without first obtaining the leave of the court. Before distraining he should come to the court and ask for authority to distrain, notwithstanding the presence of a receiver.(y)¹

Parties whose rights are interfered with by having a receiver put in their way, may, on making a proper application to the court, obtain all that they may

(x) *Bryan v. Cormick*, 1 Cox. 422; see *Langton v. Langton*, 7 D. M. & G. 30.

(y) *Sutton v. Rees*, 9 Jur. N. S. 456; see *McDonnell v. Clarke*, 2 Hog. 109; *Walsh v. Walsh*, 1 Ir. Eq. 209. Where, however, a receiver is placed over the estate of an inheritor, or superior landlord, and the lands are occupied by under-tenants, the intermediate tenant may distrain the

occupiers for rent, without any order for the purpose. Furlong on Land. and Ten. 744. Where a receiver is appointed of leaseholds, and the landlord gives him notice of a claim for rent, but takes no other steps, and the receiver sells the furniture, the landlord has no priority over other creditors in the proceeds of the sale: *Sutton v. Rees*, 9 Jur. N. S. 456.

¹ See *Everett v. Neff*, 28 Maryl. 187, and *Noe v. Gibson*, 7 Paige, C. R. 513. But where the receiver enters into possession of the demised premises, or otherwise indicates his election to take the term, he will (it is said) take it *cum onere*, and the landlord could (under the statute) follow goods removed from the premises, as in the case of an ordinary tenant. But where the receiver has done no act indicating an acceptance of the term, but simply takes possession of the goods, and removes them, the landlord cannot follow them. *Martin v. Black*, 9 Paige, C. R. 641-644, affirming the decision of the Vice-Chancellor in 3 Edw. C. R. 580. See also *Matter of Brown*, 3 Edw. C. R. 384.

justly require.(z) The court has the power, and will always take care to give a party who applies in a regular manner for the protection of his rights the means of obtaining justice, and will even assist him in asserting that right and having the benefit of it.(a)¹

The proper course for a party to adopt who claims a right paramount to that of the receiver, or rather to that of the party obtaining the receiver, and is prejudiced by having the receiver put in his way, is to apply to the court for leave to proceed, notwithstanding the possession of the receiver, or to come in and be examined *pro interesse suo*.(b)² The application

(z) *Angel v. Smith*, 9 Ves. 335; *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 117; *v. Haworth*, 3 Beav. 428; *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 117; *Fowler v. Haynes*,

(a) *Evelyn v. Lewis*, 3 Ha. 475; *Hawkins v. Gathercole*, 1 Drew. 17. 2 N. R. 156. In a case where a receiver had been appointed in a suit instituted by incumbrancers,

(b) *Hunt v. Priest*, 2 Dick. 540; *Gomme v. West*, Ib. 472; *Anon.*, 6 Ves. 287; *Angel v. Smith*, 9 Ves. 345; *Brooks v. Greathed*, 1 J. & W. 178; *Johnes v. Cloughton*, Jac. 573; *Smith v. Lord Effingham*, 2 Beav. 232; *Gooch* it was held that a judgment-creditor might file a bill against the owner and the receiver to have his debts paid out of the surplus. The incumbrancers in the former suit need not be made parties; *Lewis v. Lord Zouche*,

¹ In *Vincent v. Parker*, 7 Paige, C. R. 65, a receiver was appointed of the rents and profits of certain real estate, to a portion of which one Halbert and his wife were entitled for life, in right of the wife. This portion was not in controversy in the suit in which the receiver was appointed. A dispute arose between Halbert and his wife as to this portion of the fund; and the court directed the amount to be paid into court by the receiver, to the credit of the suit between the husband and wife.

² See *DeGroot v. Jay*, 30 Barb. 483.

may be made on summons by motion or on petition,(c) with notice,(d) and is usually framed in the alternative, that the receiver may pay the amount of the claimant's demand, or that the latter may be allowed to proceed.(e)

It was held in an Irish case that a party who had, without the leave of the court, instituted proceedings at law to recover lands in the possession of a receiver, cannot come to the court for leave to continue his proceedings.(f) If a special case, however, be made out, the court will allow a party to continue an action, notwithstanding that it has been commenced after the appointment of a receiver, and that the leave of

2 Sim. 388. So, also, in a case where a receiver had been appointed at the suit of certain incumbrancers, in which suit the first incumbrancer was not a party, it was held that a bill would lie by him against the receiver and the several parties to the suit to establish his priority: *Smith v. Lord Effingham*, 2 Beav. 232. In a later stage of the same case, 1b. 7 Beav. 374, it was said by Lord Langdale that a receiver is not a necessary party to a bill by a first incumbrancer to establish his right, and that there was reason to doubt whether even he was a proper party. It is irregular to apply for an injunction to restrain a receiver from paying moneys to other incumbrancers (2 Beav. 232), or to restrain a person from receiving moneys from a receiver. 1b. 507.

(c) Where the application is made by a person not a party to the cause, and the property over which the receiver has been appointed is landed property, the proper mode of proceeding is by petition: *Richards v. Richards*, John. 255.

(d) See as to form of notice of motion or summons for examination *pro interesse suo*, 3 Dan. Ch. Pr. 1745.

(e) *Angel v. Smith*, 9 Ves. 335; *Dixon v. Smith*, 1 Sw. 457; *Brooks v. Greathed*, 1 J. & W. 176; *Gooch v. Haworth*, 3 Beav. 428; *Potts v. Warwick and Birmingham Canal Co.*, Kay, 148; *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 125.

(f) *Lees v. Waring*, 1 Hog. 216. Comp. *Townsend v. Somerville*, 1b. 100.

the court had not in the first instance been applied for in reference to the action.^(g)¹ In a case where ejectment was brought against a receiver, although it was without the previous leave of the court, the court directed an inquiry whether it would be for the benefit of the parties interested, who were adults, that the receiver should defend the ejectment, and charge the expenses in his accounts.^(h)

If a man has already brought an action against a receiver, or has otherwise interfered with the possession of a receiver without the leave of the court, the order which retains these acts will also give leave or direct that he be examined *pro interesse suo*, the plaintiff in the cause being directed to exhibit interrogatories.⁽ⁱ⁾²

The inquiry as to interest is conducted in the same manner as it would be if the property were in the possession of sequestrators under a commission of sequestration.^(k) If the court, on examining the title, is satisfied that the right of the claimant is clear, it will at once decide the matter in his favor, without directing an inquiry, and order the receiver to pay him what he claims,^(l) or give the claimant leave to

(g) *Gower v. Bennett*, 9 L. T. 310; see *Aston v. Heron*, 2 M. & K. 397.

(h) *Anon.*, 6 Ves. 287.

(i) *Johnes v. Claughton*, Jac. 573.

(k) Dan. Ch. Pr. 952, 1580.

(l) *Dixon v. Smith*, 1 Sw. 457; *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 118; *Randfield v. Randfield*, 1 Dr. & Sm. 314, *per Kindersley*, V. C.; see

¹ See *post*, p. 205, note.

² *Parker v. Browning*, 8 Paige, C. R. 391.

enforce his remedy at law, notwithstanding the possession of the receiver.^(m) Thus, leave was given on the petition of a judgment-creditor, to sue out an *elegit* against property in the possession of a receiver.⁽ⁿ⁾ So also, where a party wishes to distrain for rent on property in the possession of a receiver, the court, on being satisfied that the legal right of distress is paramount to the title of the party for whose benefit the receiver was appointed, will allow the distress to be made.^(o) So also, where a rent-charge created by a railway company under the Lands Clauses Act, had been reserved to a landowner, the court gave him liberty to distrain, notwithstanding a receiver had been appointed of the tolls of the company, in a suit instituted by the owner of a similar rent-charge, on behalf of all the other owners of similar rent-charges who should come in and contribute to the expenses of the suit.^(p) So also in a case where it was held that a receiver ought not to

Ex parte Thurgood, 18 L. T. N. S. 18, where damages for injuries sustained by a collision had been recovered against a railway company over which a receiver had been appointed.

^(m) Where a party, claiming under a title paramount to that under which the receiver is appointed, makes out the title he alleges, and is permitted to enforce his remedy at law, he will be allowed the costs of the application: *Eyton v. Denbigh, &c., Railway Co.*, L. R. 6 Eq. 14; see

Walsh v. Walsh, 1 Ir. Eq. 209. Comp. *McDonnell v. Clarke*, 2 Hog. 109.

⁽ⁿ⁾ *Gooch v. Haworth*, 3 Beav. 428; *Potts v. Warwick and Birmingham Canal Co.*, Kay, 142.

^(o) See *Cramer v. Griffith*, 3 Ir. Eq. 232; *Russell v. East Anglian Railway Co.*, 3 Muc. & G. 118; *Sutton v. Rees*, 9 Jur. N. S. 456.

^(p) *Eyton v. Denbigh, &c., Railway Co.*, L. R. 6 Eq. 14, 488; see S. C., 16 W. R. 928.

have been appointed, leave was given at the same time to the execution-creditor to levy, notwithstanding the appointment.(q)

In cases where the court is not satisfied that a receiver ought to have been appointed, the court may also, in order that the execution-creditor may not suffer loss by the possession of the receiver, in case it shall appear in proceedings taken by the creditor that his right ought not to have been interfered with by such possession, order that the receiver keep within the bailiwick for a certain period sufficient property to answer the demand ; or it will be ordered that the petitioner may levy unless the amount of the demand be paid into the bank to the credit of the cause, within a week from the service of the order, the money to remain in the bank subject to the order of the court, and the receiver to be at liberty to pay it in.(r)

If incumbrancers come in for examination *pro interesse suo*, and it turns out upon inquiry that their claim is made out, they are entitled to have the rents and profits which have been received and which are to be received by the receiver, applied in payment of their incumbrances, after paying the costs of the application.(s)

(q) *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 151, *Railway Co.*, 3 Mac. & G. 125; 153.
see *Fowler v. Haynes*, 2 N. R. 156.

(s) *Walker v. Bell*, 2 Madd. 21; *Tatham v. Parker*, 1 Sm. & G. 506; see *Walsh v. Walsh*, 1 Ir. Eq. 209.

(r) *Russell v. East Anglian*

If there is a doubtful question, and the question to be tried is a pure matter of title, the court will give the claimant leave to bring ejectment, taking care, however, to protect the possession by giving proper directions.(t) It is not the course of the court, unless it is perfectly clear that there is no foundation for the claim, to refuse liberty in any case to try a right which is claimed against its receiver.(u)

In a case where a prior incumbrancer had delayed too long in pursuing his remedies, the court refused his application that a receiver who had been appointed at the suit of a second incumbrancer should apply the rents according to their priorities, but leave was given to bring ejectment. The ground of the decision was that the prior mortgagee had no right to that relief by petition which he had sought, but had not followed up in another proceeding. But no costs were given against the prior incumbrancer.(x)

Where a receiver has been appointed over the estate of a tenant for life, the remainderman has a right immediately on the death of the tenant for life to go into possession without making any application to the court.(y)

To whom Moneys in the Hands of a Receiver appointed in a Foreclosure Suit belong on dismissal of Bill.—When

(t) *Angel v. Smith*, 9 Ves. 335; (x) *Brooks v. Greathead*, 1 J. & W. 178; *Brooks v. Greathead*, 1 J. & W. 178.
 178; *Empringham v. Short*, 3 Ha. 470; *Re Butler*, 13 Ir. Ch. 457. (y) *Britton v. McDonald*, 5 Ir. Eq. 275; *Re Stack*, 13 Ir. Ch. 213.

(u) *Randfield v. Randfield*, 3 D. F. & J. 772.

money comes into the hands of a receiver appointed in a foreclosure suit, and no particular direction has been given for its application, it belongs in the first instance to the plaintiff, who will be entitled to receive it on the dismissal of the bill.(z) An order for payment may be made on motion after the suit is out of court by the dismissal of the bill.(a)

Committal, &c., for Disturbance of Receiver.—A man who disturbs or interferes with the possession of a receiver is guilty of a contempt, and is liable to be committed.(b) In extreme or aggravated cases the court will for the purpose of vindicating its authority order a committal;(c) but the court does not ordinarily punish by actual committal. It is generally satisfied with ordering the party in contempt to pay the costs and expenses occasioned by his improper conduct and the costs of the application.(d)¹ In cases where the contempt consists in entering upon land in the possession of a receiver, or in bringing an action at law against a receiver, or against a party over

(z) *Paynter v. Carew*, 18 Jur. 417.

(a) *Wright v. Mitchell*, 18 Ves. 292.

(b) *Supra*, p. 177.

(c) *Broad v. Wickham*, 4 Sim. 511. No order *nisi* is necessary on an application to commit a person for taking forcible posses-

sion against a receiver. *Broad v. Wickham*, 4 Sim. 511.

(d) *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 119; *Hawkins v. Gathercole*, 1 Drew. 18; *Fripp v. Bridgwater, &c., Railway Co.*, 3 W. R. 356; *Ames v. Birkenhead Docks*, 20 Beav. 345; *Lane v. Sterne*, 3 Giff. 629.

¹ See *Clark v. Beninger*, 9 Am. Law Reg. (N. S.) 304.

whose property a receiver has been appointed, the course of the court is to restrain by injunction the party in contempt from trespassing or prosecuting the action, as the case may be, and ordering him to pay the costs of the application.(e) Whether the party proceeding at law did or did not know that a receiver has been appointed over property, or however clear his right may be, the court will restrain the prosecution of the claim if it be instituted without leave.(f) In *Turner v. Turner*(g) the agents of the receiver in the cause, acting under the leave of the court, having taken forcible possession of a house occupied by a servant of one of the defendants, an order was made restraining that defendant from prosecuting an indictment against the agents. An action, however, against a person who professes to act under the authority of a receiver will not be restrained unless it be clear that he was acting under authority.(h)

A motion ought not to be made to commit a person for disturbing the possession of a receiver, when it is made long after the act complained of, and is made, not for the protection of the receiver's possession, but to compel payment of expenses after the question relating to the possession is settled. The proper course is to make such a direct application for the costs as is warranted by the circumstances.(i)

(e) *Johnes v. Cloughton*, Jac. 573; *Aston v. Heron*, 2 M. & K. 473.
 390; *Tink v. Rundle*, 10 Beav. 318; *Pevelyn v. Lewis*, 3 Ha. 473; *Ames v. Birkenhead Docks*, 20 Beav. 354.
 (f) *Pevelyn v. Lewis*, 3 Ha. 473.
 (g) 15 Jur. 218.
 (h) *Birch v. Oldis*, Sau. & Sc. 146.
 (i) *Ward v. Swift*, 6 Ha. 312.

Sheriff may not disturb Possession of a Receiver.—The court will not protect a sheriff who executes process after notice from a receiver that he is in possession.^(k)¹

A sheriff who seizes goods in the possession of a receiver is guilty of contempt,^(l) and may be committed, even although the act is the act of the under-sheriff, and there is no reason to infer that it is the personal act of the sheriff.^(m) In a case, however, where the under-sheriff had seized goods in the possession of a receiver, the court on the submission of the sheriff would not commit him, but ordered him to withdraw from possession, and to pay the costs. It was considered that this order was sufficient under the circumstances of the case for the maintenance of the jurisdiction.⁽ⁿ⁾²

Where the sheriff has taken property, part of which is claimed by a receiver, the latter will be directed to give a list of the property claimed by him to the

(k) *Try v. Try*, 13 Beav. 422 ; (l) *Lane v. Sterne*, 3 Giff. 629.
see *Rock v. Cook*, 2 Ph. 691, (m) *Russell v. East Anglian*
where the sheriff entered under a *Railway Co.*, 3 Mac. & G. 112.
fi. fa. issued out of chancery. (n) *Ib.* 119.

¹ The appointment of a receiver after suit brought does not cause the suit to abate; *Phoenix Warehousing Co. v. Badger*, 6 Hun, 293. If a receiver is appointed by a State court, in a suit by stockholders against a corporation, the court will not, at the instance of creditors, on the subsequent bankruptcy of the corporation, discharge the receiver and turn the property over to the assignee. *Myer v. Crystal Lake, &c., Works*, 14 Nat. Bank. R. 9.

² See *The Albany City Bank v. Schermerhorn*, 9 Paige, C. R. 372, and 10 Id. 263, stated *ante*, p. 182, note.

sheriff, who will be ordered to withdraw from the possession of the specified property.(o)

The sheriff may also be restrained, if necessary, from compelling the receiver to interplead, and will be ordered to pay the costs of proceedings for that purpose. If the execution-creditor is before the court, he will be restrained from proceeding against the sheriff in relation to the property seized by him, or any other property in the possession of the receiver. If the execution-creditor is not before the court, this cannot be done, but the sheriff can come to the court for protection, if necessary.(p)

In cases where the court is not satisfied that a receiver ought to have been appointed, the court may, in order that the execution-creditor may not suffer loss by the possession of the receiver in case it shall appear in proceedings taken by the creditor that his right ought not to have been interfered with by such possession, order that the receiver retain within the bailiwick for fourteen days goods, chattels, and effects equal in value to those seized by the sheriff, not exceeding what would be necessary to satisfy the levy in the writ of *fi. fa.*, such value to be settled, if necessary, by the judge.(q)¹

(o) *Wilmer v. Kidd*, Set. on *Railway Co.*, 3 Mac. & G. 120, Decr. 1002.

(p) *Russell v. East Anglian* (q) *Ib.* 121, 122.

¹ See, in this connection, *Rich v. Loutrel*, 9 Abb. Pr. R. 356. In this case, however, the sheriff's levy was prior to the appointment of the receiver. In *Edwards v. Edwards*, 34 L. T. Rep., N. S. 472, it was held that the appointment of a receiver, by an order which

provides that the person named therein shall be appointed receiver upon his giving security, takes effect only from the date of the chief clerk's certificate, that the security is perfected. Therefore, when after such an order, and before the receiver so appointed had perfected his security, an execution creditor who had not received notice of the appointment put the sheriff in possession of the goods over which the receiver was appointed; *Held*, reversing the judgment of Malins, V. C., that the execution creditor was entitled to the goods.

CHAPTER VII.

POWERS AND DUTIES OF A RECEIVER.

THE general duty of a receiver may be said to be to take possession of the estate and premises, or any other property, the subject-matter of dispute in the cause, in the room or place of the owner thereof; and, under the sanction of the court, when necessary, to do all such acts of ownership as to the receipt of rents, compelling payment of them, management, and letting the lands and houses, and otherwise making the property as productive for the parties to be ultimately declared to be entitled thereto as the owner himself could do if he were in possession.¹

¹ A receiver is, as a general rule, a mere custodian, and has no powers except those conferred upon him by the order of his appointment. See *Yeager v. Wallace*, 44 Penn. St. R. 296; *Verplanck v. The Mercantile Ins. Co.*, 2 Paige, C. R. 453; *Hooper v. Winston*, 24 Illinois, 363; *Grant v. The City of Davenport*, 18 Iowa, 194. See, also, *Benneson v. Bill*, 62 Illinois, 408, where it was held that a receiver of an insolvent insurance company appointed at the suit of creditors should not be directed by the terms of his appointment to pay the debts of the company. His functions should be simply to collect the assets and bring the money into court for distribution. But "in the progress and growth of equity jurisdiction it has become usual to clothe such officers with much larger powers than were formerly conferred," *per* Swayne, J., in *Davis v. Gray*, 16 Wal. 219. In many of the United States, moreover, enlarged powers are conferred by statute upon receivers in certain cases; but persons invested with such authority are not strictly receivers—they are statutory assignees, and have much more extensive duties and powers than those of a mere custodian of property. See the lan-

Parties required to deliver up Possession.—Where parties to the record are directed by the order to deliver up to the receiver the possession of such parts of the property as are in their holding,(a) the receiver, as soon as his appointment is complete, should apply to all such parties to deliver up possession accordingly. If any of them refuse to do so, the receiver should report the refusal to the solicitor of the party having the conduct of the proceedings, who must then serve such party personally with the order directing the possession to be delivered up.(b)

If possession is still withheld from the receiver, an application should be made by motion *ex parte* for a writ of assistance directed to the sheriff of the county wherein the property is situate, to put the receiver in possession pursuant to the order.(c) The application should be supported by an affidavit of service of the order and of non-compliance.(d) The writ is prepared, issued, and executed in the ordinary manner.(e)¹

(a) *Supra*, p. 14. for writ of assistance, 3 Dan. Ch.

(b) *Green v. Green*, 2 Sim. Pr. 51, 1734.

430; Ord. XXIX. r. 5. (d) Dan. Ch. Pr. 1578; see as

(c) Dan. Ch. Pr. 1578; see as to form of affidavit, 3 Dan. Ch. Pr. 1735.

1229; as to form of motion-paper (e) See Dan. Ch. Pr. 957.

guage of Judge Strong in *Yeager v. Wallace* (*supra*); also *Runyon v. The Farmers' and Mechanics' Bank*, 3 Green, C. R. 480; *Cooney v. Cooney*, 65 Barb. 524; and the statutes of the different States cited, *ante*, in the notes to Chapter I.

¹ The property may be sequestered, and the agents and servants of the party may be prohibited from delivering it to him, or applying it to his use, on pain of contempt. *The People v. Rogers*, 2 Paige, C. R. 103. See also *Parker v. Browning*, 8 Paige, C. R. 388, cited *ante*, page 178, note; and *In re Cohen & Jones*, 5 Cal. 494.

If the party to the proceedings is not ordered to deliver up possession to the receiver, he is not bound to do so; but he will be charged with an occupation rent for the premises in his possession.^(f) A person in possession, it may be observed, who has been ordered to pay an occupation rent, will not be ordered on motion before the hearing to pay an occupation rent for a period antecedent to the order for fixing occupation rent, if under the circumstances of the case the period for fixing the occupation rent and appointing the receiver is the origin of his tenancy.^(g)

Tenants should be required to attorn.—If tenants in possession of real or leasehold estates over which a receiver is appointed, are directed by the order to attorn to the receiver,^(h) the receiver should, as soon as his appointment is complete, call on them to attorn accordingly.⁽ⁱ⁾

If the tenant refuses to attorn to the receiver, the party prosecuting the order should serve him personally with a copy of the order for the appointment of a

^(f) *Randfield v. Randfield*, 7 W. R. 651.

^(g) *Lloyd v. Mason*, 2 M. & C. 487.

^(h) *Supra*, p. 14.

⁽ⁱ⁾ The attornment to a receiver appointed by the Court of Chancery constitutes a tenancy by estoppel between the tenant and receiver, which the court applies to the purpose of collecting and securing the rents till a decree can be pronounced, taking

care that the tenants shall be protected, both while the receiver continues to act, and when, by the authority of the court, he is withdrawn. *Evans v. Mathias*, 7 E. & B. 602. The attornment creates a tenancy between the tenant and receiver only, and does not enure for the person who may ultimately be found to be entitled to the legal estate, so as to enable him to distrain. 1b.

receiver, and of the order or certificate completing the appointment,(*k*) and with a notice in writing signed by the receiver requiring him to attorn and pay.(*l*) If he still refuse to attorn, the tenant should be served with notice of motion to attorn and pay within a limited time after the service of the order to be made on the motion.(*m*)

The person served may appear on the motion and inform the court whether he is in possession as tenant or not.(*n*) If he does not appear, the order will be made upon an affidavit of service of the notice of motion, orders, certificate, and notice to attorn, and on proof by affidavit of the refusal to attorn.(*o*) The order will be made without costs in cases where the tenant had reasonable ground for refusing to attorn.(*p*)

A copy of the order indorsed in the usual manner is then served personally upon the person thereby directed to attorn:(*q*) and upon production to the record and writ clerk of an affidavit of such service, and of an affidavit by the receiver of non-compliance, he will seal an attachment against the party in contempt.(*r*)

(*k*) *Supra*, p. 165-6.

(*l*) Dan. Ch. Pr. 1578; see as to form of notice to tenant to attorn, 3 Dan. Ch. Pr. 1737; as to form of attornment, *Ib.* 1738.

(*m*) See as to form of notice of motion for tenant to attorn and pay, 3 Dan. Ch. Pr. 1739.

(*n*) *Reid v. Middleton*, T. & R. 457; *Hobhouse v. Hollcombe*, 2 DeG. & S. 208.

(*o*) Dan. Ch. 1578; *Hobson v. Shearwood*, 19 Beav. 575; see as to form of affidavit in support of motion to attorn, 3 Dan. Ch. Pr. 1741.

(*p*) *Hobhouse v. Hollcombe*, 2 DeG. & S. 208. Comp. *Hobson v. Shearwood*, 19 Beav. 575.

(*q*) Dan. Ch. Pr. 1579.

(*r*) See as to form of affidavit, 3 Dan. Ch. Pr. 1743.

The attachment is prepared, issued, and executed in the ordinary manner.(s)

In cases where it does not clearly appear what is the nature of the interest of the person in possession of property, it is not necessary to make him a party to the suit. The court will upon the allegation that he is a tenant treat him as a tenant, and require him to attorn, unless he can satisfy the court that he holds the possession in some other character.(t) In *Reid v. Middleton*(u) it appeared that the tenant in possession had not agreed to pay any specific rent, and an order was made in consequence, that an occupation rent should be settled by the Master, and that the tenant should pay the arrears and future payments of such occupation rent.

If a judgment-creditor be in possession under his judgment, the court cannot order him to attorn.(x)

Delivery of Court Rolls.—The court will, on the petition of the lord, order the steward of a manor who holds the court rolls as the lord's agent, to deliver them up to the receiver.(y)

Rents in Arrear, &c.—A receiver is entitled to all the rents in arrear at the date of his appointment,(z) and

(s) Dan. Ch. Pr. 941.

(t) *Reid v. Middleton*, T. & R. 455.

(u) *Ib.*

(x) *Davis v. Duke of Marlborough*, 2 Sw. 118.

(y) *Rawes v. Rawes*, 7 Sim. 624.

(z) *Codrington v. Johnstone*, 1 Beav. 524; *McDonnell v. White*, 11 H. L. 570; see *Russell v. Russell*, 2 Ir. Ch. 574. Although the tenants are only responsible from the time when the order to pay their rents to the receiver is served on them, the person enti-

to all the rents which accrue during the continuance of his receivership; an order may be obtained on motion or summons with notice to the tenant for payment thereof by him to the receiver, notwithstanding that he may not have attorned. The tenant will have to pay the cost of the application.^(a)¹

A person who admits a sum of money to be due from him to the estate, cannot dispute the right of the receiver to collect it.^(b)

Although a receiver is entitled to all arrears of rent at the date of his appointment, produce which has been already separated from the estate before the date of the order, though not yet converted into money, does not belong to the receiver. Where, therefore, a manager was appointed of a West Indian estate with directions to receive and remit the rents and produce, the consignees were not ordered to pay into court the surplus moneys arising from the produce of the estate which had been severed and shipped by the mortgagor

tled to receive such rent and Beav. 575; see as to form of
arrears is bound from the date of notice of motion for summons, 3
the order for a receiver, when he Dan. Ch. 1744.

has notice of such order. *Hollier* (b) *Wood v. Hickings*, 2 Beav.
v. Hedges, 2 Ir. Ch. 376. 294. [See *post*, p. 205, note 1.]

(a) *Hobson v. Shearwood*, 19

¹ In a creditor's suit, where a receiver had been appointed, and where the debtor was a tenant and had underlet, it was held that rents which came into the receiver's hands from the under-tenants ought not to be considered as subject to distribution among creditors until the claim of the original landlord for rent had been extinguished. *Riggs v. Whitney*, 15 Abb. Pr. Rep. 388.

As to the duties of a receiver of rents, see *Keenan v. Shannon*, 9 Nat. Bank. Reg. 441.

to the consignees, but had not been received by them at the date of the order.(c)

Duty of Receiver to take Proper Receipts.—When the order directs that the receiver shall put down the interest of incumbrancers, or make any other payments, he must, of course, comply with that order, and the sums so paid by him will be allowed in his accounts. He must, however, take proper receipts from the persons to whom he makes such payments, and it must be remembered that in passing his accounts he will be subject to the rules to which all other accounting parties are subject,(d) and he will only be allowed to discharge himself by affidavits as to those payments which are under 40s.; for all other payments he must produce proper vouchers.(e)

Distress.—After the tenant has attorned to the receiver, and so created a tenancy between him and the receiver,(f) the receiver may distrain upon the tenant in his own name, and on his own authority, without leave obtained from the court.(g) Before attornment the receiver must distrain in the name of the person having the legal estate.(h)

(c) *Codrington v. Johnston*,
Beav. 520.

(d) Dan. Ch. Pr. 1586.

(e) *Ib.*

(f) See *Evans v. Mathias*, 7
E. & B. 602.

(g) *Raincock v. Simpson*, cit.
1 Dick. 120; *Pitt v. Snowden*, 3
Atk. 750; *Hughes v. Hughes*, 3
Bro. C. C. 86; 1 Ves. Jr. 161;

Dancer v. Hastings, 4 Bing. 2;
12 Moo. 34; *Bennett v. Robins*,
5 C. & P. 379; see *Jolly v. Ar-*
buthnot, 4 D. & J. 239. A re-
ceiver may employ a bailiff to
make a distress. *Dancer v. Hast-*
ings, 4 Bing. 2; 12 Moo. 34; see
Birch v. Oldis, Sau. & Sc. 145.

(h) *Hughes v. Hughes*, 3 Bro.
C. C. 85; 1 Ves. Jr. 161.

Leave that the receiver may distrain in the name of the person having the legal estate may always be obtained from the court on motion or petition.⁽ⁱ⁾ If there is any doubt who has the legal right to the rent, the receiver should make an application to the court for directions thereon; but in cases where there is no doubt who has the legal right to the rent, the leave of the court to distrain in the name of the person having the legal estate does not seem to be necessary.^(k) If, however, the person having the legal estate is a trustee, and the receiver is a solicitor, the court is unwilling to give him power of instituting proceedings against a tenant for arrears of rent if the trustee is opposed to the proceedings. A reference to the Master as to the propriety of proceeding in the name of the trustee was refused in such a case.^(l)

Instead of moving that he may have liberty to distrain in the name of the party having the legal estate, the receiver may obtain an order on motion or summons, with notice to the tenant for payment, notwithstanding that he may not have attorned,^(m) or he may move that the tenants do attorn, and the distress may afterwards be made in his name. This will be

⁽ⁱ⁾ *Shelly v. Pelham*, 1 Dick. 750; *Brandon v. Brandon*, 5 Madd. 473.

Mitchell v. Duke of Manchester, 2 Ib. 787; *Hughes v. Hughes*, 1 Ves. Jr. 161; 3 Bro. C. C. 85. See as to form of order ^(l) *Della Caine v. Hayward*, McClell. & Y. 272.

Set. on Decr. 1013. ^(m) *Hobson v. Shearwood*, 19 Beav. 575; *supra*, p. 198.

^(k) *Pitt v. Snowdon*, 3 Atk.

¹ See remarks of Cowen, J., in *Merritt v. Lyon*, 16 Wend. 410.

ordered on motion; and if the tenants oppose on the ground of the pendency of an action commenced before the appointment of the receiver for the same rent, the motion will be ordered to stand over until the action has been tried.(n)

In *Brandon v. Brandon*,(o) it was said to be the practice for the receiver to distrain upon his own discretion for rent in arrear within the year; but as to rent in arrear for more than a year, that an order from the court was necessary. *Brandon v. Brandon* was, it must be observed, a case in which the legal estate was in trustees, and a motion was made that the receiver might be at liberty to distrain in the name of the trustees, so that the statement as laid down by Leach, M. R., must perhaps be taken as referable to cases where the legal estate is outstanding, and there has been no attornment to the receiver. As a receiver is entitled to all arrears of rent, he may, it would appear, if there has been attornment, distrain without obtaining the leave of the court for all arrears accrued during the tenancy.

An application for leave to distrain is made in chambers and ordinarily by summons, but it is not usual to draw up an order in such cases, the minute made by the chief clerk of the directions given being deemed sufficient.(p)

(n) *Hobhouse v. Holcombe*, 2 DeG. & S. 208; see as to form of notice of motion for tenant to attorn and pay rent, and affidavits, 3 Dan. Ch. Pr. 1739-1741.

(o) 5 Madd. 473.

(p) Dan. Ch. Pr. 1584; see as to form of summons for leave for receiver to distrain, 3 Dan. Ch. Pr. 1746; and bring actions for arrears of rent, Ib. 1747.

In a case where a plaintiff upon whose application the receiver has been appointed was proceeding both at law and in equity, the court would not give leave to the receiver to distrain upon the tenants unless the plaintiff would undertake to proceed in equity only, because the tenants might file bills of interpleader.^(q)

The abatement of the suit does not affect or determine the appointment of a receiver, or suspend his authority to proceed against the tenants. His authority continues until an order is made for his removal. Until such an order is made a receiver may distrain or perform his other duties, notwithstanding a total abatement of the suit.^(r)

It was held in an Irish case that a tenant who rescues a distress made by the receiver, will not be attached for the rescue, but that the receiver must proceed at common law or under the statute.^(s)

Duty of Receiver appointed over Personal Property.

—Where a receiver is appointed by the court to get in outstanding personal property, it is his duty to collect all he can get in.¹ The order appointing a

(q) *Mills v. Fry*, Coop. 107. (s) *Fitzpatrick v. Eyre*, 1 Hog.

(r) *Newman v. Mills*, 1 Hog. 171.

291; *Brennan v. Kenny*, 2 Ir. Ch. 583.

¹ A receiver to whom money is paid is not bound to investigate the liability of the party paying it, and he can part with it only under an order of the court. Even if the money is paid by mistake, the court alone can order it to be refunded. *Getty v. Campbell*, 2 Robt. 664. When a good tender cannot be made to a receiver, see *Poague v. Greenlee*, 22 Grat. 724.

receiver of outstanding personal estate generally comprises a direction that the parties in whose possession the same may be shall deliver over to the person to be appointed receiver all securities in their possession for such outstanding personal estate, together with all books and papers relating thereto.(t) If the parties in whose hands such securities and papers are, refuse to deliver them up, the receiver should give notice of such refusal to the party conducting the proceedings, who must take the necessary steps for enforcing the order.(u) If the person indebted to the estate refuse to pay the amount due to them, the sanction of the judge must be obtained to the receiver putting them in suit.(x) Applications for the sanction of the judge in such cases are usually made by summons supported by affidavits or other evidence of the facts.(y)¹

(t) Set. on Decr. 1002.

unless it appears likely that some

(u) Dan. Ch. Pr. 938 *et seq.*

fruits may be derived from the

(x) *Ib.*; Set. on Decr. 1013, suit. *Dacie v. John, McClell.* 575.
1031. The court will not em- (y) See as to form of summons,
power a receiver to sue for debts 3 Dan. Ch. Pr. 1268.

¹ The right of a receiver to bring actions against persons not parties to the suit in which he is appointed, for the recovery of real or personal property, or for the collection of debts, is subject to two restrictions—in the first place, the sanction of the court must be previously obtained, and secondly, the action must be brought in the name of the party in whom the legal right or title to the property to be recovered is vested. *Daniel's Ch. Pr.* 1439; and see the cases cited in note g, p. 216, *infra*, and *Manlove v. Burger*, 38 Ind. 211; *Battle v. Davis*, 66 North Carolina, 252; *Screven v. Clark*, 48 Georgia, 41. This rule is generally followed in the United States. The receiver is regarded as a mere custodian, and not as having any legal right to the property. See *Yeager v. Wallace*, 44 Penn. St. Rep. 294 (where the doctrine is stated by Strong, J.); *Freeman v.*

Receiver of Partnership.—When a receiver is appointed to manage a partnership concern, he must be

Winchester, 10 Sm. & Marsh. 577; *Newell v. Fisher*, 24 Miss. 392; *Leonard v. Storrs*, 31 Alab. 488; *Green v. Winter*, 1 Johns. C. R. 60; *Merritt v. Lyon*, 16 Wend. 405; *King v. Cutts*, 24 Wis. 627; though in *Tillinghast v. Champlin*, 4 R. Island, 177, it was said that the better practice is for the receiver to bring actions *suo motu*, and without special leave.

The court, however, may by its decree, under certain circumstances, confer upon the receiver the right to sue in his own name. *Leonard v. Storrs*, 31 Ala. 488; see also *Hardwick v. Hook*, 8 Georgia. 358; *Adams v. Woods*, 15 Cal. 206; and *Iddings v. Bruen*, 4 Sand. C. R. 417; and such an order is frequently made. And in some States the authority to bring actions is conferred upon some receivers by statute. *Hamlin v. Wright*, 23 Wisconsin, 493; *Grant v. The City of Davenport*, 18 Iowa, 194; *Everett v. The State*, 28 Maryl. 208; *Hoyt v. Thompson*, 1 Selden, 320; *Porter v. Williams*, 5 Selden, 142; *Stewart v. Beebe*, 28 Barb. 34; *Coope v. Bowles*, 42 Barb. 87; *Bolles v. Duff*, 43 N. Y. 469; *Rockwell v. Merwin*, 45 Id. 166; *Story v. Furman*, 25 Id. 214; *Calkins v. Atkinson*, 2 Lans. 12; *The Albany City Ins. Co. v. Van Vranken*, 42 How. Pr. R. 281; *Manlove v. Burger*, 38 Ind. 211; *Same v. Naylor*, Id. 424. See the remarks of Judge Strong on this subject, in *Yeager v. Wallace*, 44 Penn. St. R. 296; and of Wayne, J., in *Booth v. Clark*, 17 Howard, 331; see, also, *Bank of North America v. Wheeler*, 28 Conn. 441. The receivers of national banks may sue without special orders. *Bank v. Kennedy*, 17 Wal. 19. See also *Kennedy v. Gibson*, 8 Id. 506; *Bank of Bethel v. The Pahquioque Bank*, 14 Id. 383.

In *Booth v. Clark*, it was decided that a receiver had no authority to sue outside the jurisdiction in which he was appointed; and this rule was followed in *Graydon v. Church*, 7 Michigan, 36. and *Hope Ins. Co. v. Taylor*, 2 Robt. 278; and see *Hunt v. Columbian Ins. Co.*, 55 Maine, 297; *Harvey v. Varney*, 104 Mass. 436-443; and *supra*, pp. 172-3. But *Runk v. St. John*, 29 Barb. 585, is the other way. See also *Bidlack v. Mason*, 11 C. E. Green, 230. Where, however, the legal title has been conferred upon the receiver by an assignment from the former holder, he may sue. *Graydon v. Church (supra)*. The appointment of a receiver of a bank by a

guided by the terms of the order of appointment, keeping in mind the general maxim that as his au-

State court, will not prevent an action in another State against the company. See *City Ins. Co. v. Commercial Bank*, 68 Ill. 348.

And a receiver may prove a debt against a bankrupt in another State. *In re Republic Ins. Co.*, 8 Nat. Bank. Reg. 197. So also *Armstrong v. Armstrong*, L. R. 12 Eq. 614.

The receiver appointed in bankruptcy proceedings before the election of an assignee is not entitled to bring suit for the recovery of property transferred before the commencement of bankrupt proceedings in violation of the bankrupt act; he is a mere custodian. *Lansing v. Manton*, 14 Nat. Bank. Reg. 127.

The court will restrain a receiver from bringing an unauthorized and unjust action. See the *Matter of Merritt*, 5 Paige, 131, where the law upon this subject is stated by Chancellor Walworth, whose decree was affirmed in *Merritt v. Lyon*, 16 Wend. 405.

The receiver's authority to sue must be duly alleged, and if traversed duly proved. *Gillett v. Fairchild*, 4 Denio, 80; *White v. Joy*, 3 Kern. 83; *Bangs v. McIntosh*, 23 Barb. 598. See, however, *Case v. Marchend*, 23 Louisiana Ann. 60.

A receiver cannot be sued without leave of the court: *De Groot v. Jay*, 30 Barb. 483; and a violation of this rule will be regarded as a contempt, and punished accordingly; *Taylor v. Baldwin*, 14 Abbott's Pr. R. 166; *Riggs v. Whitney*, 15 Id. 388; *Noe v. Gibson*, 7 Paige, C. R. 515; *Robinson v. Atlantic and Great Western Railway Co.*, 66 Penna. St. R. 16; *Thompson v. Scott*, 3 Cent. Law J. 737; *Allen v. Central R. R.*, Id. 434, 2 Law and Eq. Rep. 202. But a receiver may be sued for a breach of any obligation or duty assumed by him in conducting a business in which he is acting as receiver. Thus a receiver of a railroad has been held liable as a common carrier. See *Blumenthal v. Brainerd*, 38 Vermont, 408; *Paige v. Smith*, 99 Mass. 395. See 2 Southern Law Rev. (N. S.) 576; article by Mr. High. And a receiver is liable for taking possession of property not embraced in the decree appointing him. *Hills v. Parker*, 111 Mass. 508. In actions against receivers, they ought not to waive any legal technical defence. *McEvers v. Lawrence, Hoffman*, C. R. 172.

When actions are properly brought or defended by a receiver, the court will not suffer the costs to be laid upon him. *Devendorf v. Dickinson*, 21 How. Pr. R. 275; see also the judgment in *Commonwealth v. Runk*, 26 Penna. St. R. 237; *The Columbian Ins. Co. v.*

thority flows from the court, he must, in all cases, act under a special order to be obtained from the court.

Power and Duty of Receiver as to letting Estates.—

A receiver being appointed by the court for the management of the estate, it was formerly a motion of course to give liberty for a receiver to set or let. An express power to that effect was afterwards inserted in most orders.(z) By the 64th order of April, 1828, it was ordered that in any order directing the appointment of a receiver of a landed estate, there be inserted a direction that he should have power to set and let with the approbation of the Master, who was empowered without the special order of the court to receive and report on proposals from the parties interested, for the management or letting of the estate.(a) Since the 15 & 16 Vict., ss. 80 and 86, a direction to manage or set and let is no longer inserted in the order of appointment, the judge having power to give any

(z) *Neal v. Bealing*, 3 Sw. hill, 14 Sim. 600; *Duffield v.*
304 n. *Elwes*, 11 Beav. 590.

(a) See *Thornhill v. Thorn-*

Stevens, 37 New York, 536; and *infra*, p. 231. Where, however, the matter is purely personal with the receiver, costs may be imposed on him. *Chapin v. Thompson*, 4 Hun, 779.

As to a receiver's compromising a claim under the direction of the court, see *Suydam v. The Receivers*, 2 Green, C. R. 278; referring claims, *Guardian Savings Institution v. Bowling Green Savings Bank*, 65 Barb. 275; and settling mutual claims, *Matter of Van Allen*, 37 Barb. 225.

The court may, upon summary application, direct a receiver of an insolvent corporation to allow a set-off in favor of a party against whom the receiver has brought an action. *Holbrook v. The Receivers*, 6 Paige, C. R. 220.

directions in chambers as to the management of the estate.(b)

Under the old practice the course of the court was to order the Master to receive proposals as to leases of property over which a receiver had been appointed, and to report his opinion thereon. The court did not delegate to the Master the power of approving or sanctioning leases. The order was simply that he should receive proposals for leases, and report his opinion thereon to the court.(c) A receiver could not, without the sanction of the court, set or let,(d) even for a single year.(e) A lease granted by the receiver without the consent of the court, as evidenced by the Master's Report, was invalid.(f) If, however, a receiver had contracted for a lease without the consent of the court, the court would, on motion, refer it to the Master to see if the contract was for the benefit of the parties, and what better rent could be obtained. If the contract was approved of, it was confirmed.(g)

A receiver under the present practice may let at his discretion for a year certain or less, or for any time not exceeding three years, without applying for the sanction of the judge.(h) But the power of a receiver to grant leases is limited to such parol leases as are authorized by the second section of the Statute of

(b) Set. on Decr. 1016.

(f) *Durnford v. Lane*, 2 Madd.

(c) *McDermott v. Kcaley*, Jac. Ch. 303.

374; *Symons v. Symons*, 2 Y. & C. 1.

(g) *Anon.*, 1b.

(h) *Shuff v. Holdway*, Dan.

(d) 1 Ves. Jr. 138.

Ch. Pr. 1585.

(e) *Wynne v. Lord Newborough*, 1b. 164.

Frauds.(i) If a receiver grants a lease for a longer period than three years, the lease will be binding as between him and the party who takes the lease, because the latter cannot be suffered to repudiate his agreement and say that the lease is invalid on the ground that it was not made by the person having the legal estate or power of leasing.(j) As, however, between the lessee and the owner of the legal estate, the lease has, in the absence of special circumstances, no binding force, even though it may have been made with the sanction of the judge. The powers of the receiver are limited to the receiving proposals, and making arrangements as to the leasing of the property, and granting the parol lease before referred to. He has no power to transfer the legal estate in the property over which he has been appointed receiver, nor can such a power be given to him by the judge.(k) Leases of property in the hands of a receiver should be made or signed by the person having the legal estate or power of leasing. If necessary, recourse is to be had to the provisions of the various statutes conferring jurisdiction on the court to sanction leases.(l)

A receiver should move for liberty to let before the old lease expires; although, if he neglect to do so, he will be at liberty to make what he can of the estate during the current year, he will be visited with any loss which may arise.(m)

(i) 29 Car. 2, c. 2.

Madd. 469; *Evans v. Matthias*,

(j) *Dancer v. Hastings*, 4 Bing. 2; 12 Moo. 34.

7 E. & B. 602; *supra*, p. 202.

(l) Dan. Ch. Pr. 1727 *et seq.*

(k) See *Gibbons v. Howell*, 3

(m) *Wilkins v. Lynch*, 2 Moll. 499.

Where the court directs the receiver to give any one the option of being tenant, it reserves power to the receiver to inspect the state and condition of the property.(n)

In cases where the estate over which a receiver is appointed is in the colonies, the East Indies, or a foreign country, it is usual to give the receiver more extensive powers of managing and letting than in the case of estates situated in this country.(o) An inquiry is generally directed to ascertain the terms beyond which the receiver shall not be permitted to let. This is done with the view of preventing the necessity of constant applications to the court for permissions to let.(p)

A receiver must let the estate over which he is acting as receiver, to the best advantage. He is bound to obtain the best terms.(q)¹ He may not, either in his own name or through the medium of a trustee, become a tenant of any part of the estate over which he is acting as receiver.(r) A receiver cannot raise the rents on slight grounds without the leave of the

(n) *Baylies v. Baylies*, 1 Coll. 545.

(o) *Morris v. Elme*, 1 Ves. Jr. 139.

(p) — *v. Lindsay*, 15 Ves. 91.

(q) *Wynne v. Lord Newborough*, 1 Ves. Jr. 164.

(r) *Meagher v. O'Shaughnessy*, cit. Fl. & K. 207, 224; see *Anderson v. Anderson*, 9 Ir. Eq. 23; *Eyre v. McDonnell*, 15 Ir.

Ch. 534; Comp. *King v. O'Brien* 15 L. T. N. S. 23.

¹ He is bound not only to obtain the best rent, but also to lease to those who would take the best care of the property. See *Knott v. The Receivers of the Morris Canal Co.*, 3 Green, C. R. 426; also *Bolles v. Duff*, 37 How. Pr. R. 162.

court,(s) nor can he abate the rents or forgive the tenants their arrears without the consent of the parties beneficially interested.(t)

Mode in which Proposals for Leases are dealt with.
—Applications with reference to property under the management of a receiver are usually made by summons at chambers.(u) The judge at chambers receives proposals for the management and letting of the estate from the parties interested, and gives his directions thereon.

The usual course is for the proposed tenant to enter into a provisional agreement to become tenant or lessee of the property upon the terms therein specified, subject, however, to the approval of the judge. A summons for an order to carry the agreement into effect is then taken out by the plaintiff's solicitor and served on the parties interested. The application is supported by the production of the agreement and the affidavit of a land agent, or other competent person, stating the grounds on which, in his judgment, the agreement should be adopted.(v) The power to demise on the terms specified must also be shown by proper evidence. If the agreement is approved, either an order is made

(s) *Wynne v. Lord Newborough*, 1 Ves. Jr. 164. applications, Set. on Decr. 1012 *et seq.*

(t) *Evans v. Taylor*, Sau. & Sc. 681. (v) Dan. Ch. Pr. 1157; Smith, Ch. Pr. 1033; see as to form of

(u) Dan. Ch. Pr. 1587; Set. summons to approve, of agreement to grant a lease, and of affidavits to support, 3 Dan. Ch. Pr. 1281, 1282.
on Decr. 1017; see as to form of summons, 3 Dan. Ch. Pr. 1746–1750; see form of orders on such

directing it to be carried into effect, and that the lease to be granted in pursuance thereof be settled by the judge, either absolutely or in case the parties differ ; or, to save expense, the chief clerk endorses a minute of the approval on the summons, and adjourns the matter till the draft lease has been brought in for approval. Upon the draft lease, or a certified copy of the order (if any), approving the agreement, being left at chambers, a summons is taken out to settle the draft lease ;(x) or if no order has been drawn up, an appointment for this purpose is given. The summons or appointment is then served on the parties interested. The draft lease is then settled either by the judge or his chief clerk, with the assistance, if necessary, of one of the conveyancing counsel. The draft is then engrossed, and an affidavit verifying the engrossment of the lease, and of the counterpart (if any), is brought in, and the chief clerk signs a memorandum of allowance in the margin of each engrossment. An affidavit is then made verifying the engrossment with the draft as settled. A copy of the affidavit is left at chambers, with the engrossment and draft.(y) The chief clerk then signs the memorandum in the margin of each engrossment, and issues his certificate that the lease has been settled, or if an order approving the agreement has been drawn up, an order is made ap-

(x) See as to form of summons Ch. Pr. 1033 ; see as to form of to settle draft lease, lb. 1175, affidavit verifying engrossment of lease and counterpart, 3 Dan. 1283.

(y) Dan. Ch. Pr. 1157 ; Smith Ch. Pr. 1284.

proving the agreement and the lease. The certificate is completed in the usual way.(z)

Power of Receiver to give Notice to quit.—A receiver appointed by the Court of Chancery, with a general authority to let the lands from year to year, has thereby also an implied authority to determine such tenancies by regular notices to quit.(a) In *Mansfield v. Hamilton*,(b) Lord Redesdale said that the tenants of an estate being, under the circumstances of the case, tenants from year to year to the receiver, he would not turn them out without notices to quit.

If a tenant hold on after regular notice to quit given to him by a receiver, the Court of Chancery will give the receiver leave to sue the tenant for double the yearly value of the premises, under the 4 Geo. II., c. 28, s. 1.(c)

Receiver must not involve Estate in Expense.—As a general rule, a receiver must do no act which may involve the estate in expense without the sanction of the court. It is not proper for a receiver to defend actions which may be brought against him without the sanction of the judge.(d) In a case where a re-

(z) Dan. Ch. Pr. 1157; Smith *Crosbie v. Barry*, Jon. & C. 106; Ch. Pr. 1033; see as to form of *Wilkinson v. Colly*, 4 Burr. 2697.

3 Dan. Ch. Pr. 1286; as to minutes of order approving the agree- (b) 2 Sch. & Lef. 30.

ment and the lease to be issued in (c) *Wilkinson v. Colly*, 4 Burr. 2694.

pursuance thereof, Ib. 1287. (d) *Anon.*, 6 Ves. 287; *Swaby*

(a) *Doe v. Read*, 12 East, 61; *v. Dinkon*, 5 Sim. 629. The re-

ceiver had, without the authority of the court, defended an action arising out of a distress made by him upon a tenant of the estate for rent, and was unsuccessful, the court refused to allow him his costs of the action.^(e) But if he defends an action brought against him successfully, without putting the estate to the expense of an application to the court, which he might have made for his own benefit, he has the same right to be indemnified as if he had applied to the court.^(f)

Nor can a receiver bring ejectment without the leave of the court.^(g)¹

A motion, however, on the part of the tenants of an estate to restrain a receiver from doing acts which are within his authority, will be rejected with costs, as they have no sufficient interest to support it.^(h)

Power of Receiver as to Repairs.—A receiver may lay out small sums of money in customary repairs, or

ceiver should not wait to apply for leave to defend an action till just before trial. *Anon.*, 6 Ves. 286.

^(e) *Swaby v. Dickon*, 5 Sim. 629; see *Re Montgomery*, 1 Moll. 419.

^(f) *Bristowe v. Needham*, 2 Ph. 190. If the possession of a tenant under the receiver is disturbed, and no application is made to the court to prevent that dis-

turbance, the tenant is entitled to the costs of protecting his own possession. *Miller v. Elkins*, 3 L. J. Ch. 128.

^(g) *Wynne v. Lord Newborough*, 1 Ves. Jr. 164; 3 Bro. C. C. 87; *Ward v. Swift*, 6 Ha. 312; see *Mansfield v. Hamilton*, 2 Sch. & Lef. 28.

^(h) *Wynne v. Lord Newborough*, 3 Bro. C. C. 87.

¹ See *Green v. Winter*, 1 John. C. R. 60; and page 206, note 1, *ante*, and the cases there cited.

may allow the same to the tenant, but he may not apply moneys in repairs to any considerable extent, without a previous application to the judge.(i) It appears to have been formerly the rule that a receiver could not lay out any moneys on the estate at his own discretion and without the leave of the court.(k) The rule is not so strict now as it formerly was, but, as a general rule, a receiver should not, it would seem, expend at his own discretion more than 30*l.* a year without the sanction of the judge.(l) If, however, more has been expended by him than a receiver is authorized to do at his own discretion, the course of the court is to direct an inquiry into the circumstances of the expenditure, and to allow the amount so expended, if upon inquiry the expenditure has been reasonable, and be found to have been beneficial to the estate.(m)

Since the 15 & 16 Viet., c. 80, application as to repairs is to the judge in chambers, where the matter is inquired into without previous order before the repairs are authorized to be done.(n)

(i) *Att.-Gen. v. Vigor*, 11 Ves. 563; *Waters v. Taylor*, 15 Ves. 25.

(k) *Fletcher v. Dodd*, 1 Ves. Jr. 85; *Morris v. Elme*, Ib. 139; see *Tempest v. Ord*, 2 Mer. 56.

(l) Dan. Ch. Pr. 1586, n. Where the amount proposed to be expended by the receiver is small, the sanction of the judge will be given on production to the chief clerk of a letter from

the receiver stating the propriety of the intended expenditure, and the maximum amount to be laid out. Ib.

(m) *Blunt v. Clitherow*, 6 Ves. 799; *Att.-Gen. v. Vigor*, 11 Ves. 563; *Tempest v. Orde*, 2 Mer. 56. *Comp. Re Langham*, 2 Ph. 299.

(n) See as to order giving the receiver liberty to expend moneys in repairs, Set. on Decr. 1014.

If, from their amount, or the circumstances under which the moneys for repairs are claimed, the receiver feels any difficulty in allowing them, he should apply to the plaintiff's solicitor to obtain the sanction of the judge. In order to obtain it, the plaintiff's solicitor takes out a summons to the effect that the receiver appointed in the cause may be directed to execute the repairs specified in the affidavits, and to expend moneys not exceeding a certain specified sum of money, the estimated cost thereof, and that he may be allowed the amount he may so expend in passing his accounts in the cause. The summons is supported by evidence that the tenants are not liable to do the repairs, that the repairs should be made, and that the amount proposed to be expended is fair and reasonable. The order is drawn up by the registrar in the usual way.(o)

Various Applications as to the Management of the Estate.—An order may be obtained in chambers that the receiver should cut and sell timber, and employ it, if necessary, in repairs.(p) The court, before giving liberty to cut timber for repairs, will direct inquiries.(q) Where there is a receiver, a sale of timber is generally under his direction.(r)¹

(o) Smith, Ch. Pr. 1034; see 3
Dan. Ch. Pr. 1750.

(q) Ib.

(r) Ib. 1017.

(p) Set. on Decr. 1014.

¹ A receiver may in a proper case apply to the court for advice; but where the court has directed him to do a specific act, such as to sell property, he must act upon his own responsibility in carrying out the details. *Givin v. Givin*, 1 Leg. Gaz. 48.

A receiver may obtain an order to grant a license to win and get clay and brick earth on the estate, and manufacture the same into bricks.(s)

Equity where Estate of Stranger comes into possession of Receiver.—Where the estate of a stranger has come into the possession of a receiver in the cause, and has been held with the acquiescence of such of the parties to the suit as were not under disability, and no objections have been raised on behalf of any of the parties under disability, the transaction is binding on the parties; and the receiver in the cause will be ordered to pay the arrears of rent, and will be held responsible for dilapidations, the amount of which particulars shall be ascertained upon inquiry.(t) This will be ordered on petition of the owner of the estate, though not a party to the suit, without requiring him to file a cross-bill.(u)

Lessee of Land in Possession of Receiver restrained from committing Waste.—If, after a receiver has been appointed, a person has entered into an agreement with a receiver to take the lease of a farm, a bill need not be filed to restrain the lessee from committing waste. The court will, on the application of the plaintiff in the cause, grant an injunction on motion in a summary way, though he was not a party to the suit.(x)

(s) *Ib.* 1014.

(t) *Neate v. Pink*, 15 Sim. 352; see *Casamajor v. Strode*, 1 Sim. & St. 381.

452; 3 Mac. & G. 484.

(u) *Ib.*

An incumbrancer on an annuity which a receiver in the cause was ordered to pay to a lady, was refused an order for the payment of the annuity on petition. The incumbrancer not being a party to the suit, the court held that a bill must be filed.(y)

Duty of Receiver of Leaseholds.—The receiver is the officer upon whom the performance of the obligations imposed by the possession of the land is devolved.¹ A receiver over leaseholds is bound, in the first place, out of the sub-rents, to discharge the head-rent where the right of the landlord is unquestionable and undisputed, without an order from the court for that purpose. If in consequence of his default the landlord is compelled to institute proceedings for the recovery of the rent, the receiver is held liable for costs, if rents have reached his hands. The rents should be, in the first place, appropriated in payment of the head-rent. When that is discharged, whatever surplus remains should be distributed according to the interest of the parties in the cause, and the order of the court. If the receiver pursues a different course, and if in paying away the rent received he choose to speculate upon obtaining other funds wherewith to pay the head-rent, he does not act in accordance with the order of the court, and will be compelled by the court to pay the arrears of head-rent.(z)

(y) *Wastell v. Leslie*, cited 15 Sim. 453.

(z) *Balfe v. Balfe*, 1 Ir. Ch. 365.

¹ Where a lease contains a clause against alienation without the content of the lessor, such a clause is binding on the receiver. *Spencer v. Darlington*, 24 P. F. Smith, 286.

If any dispute or uncertainty as to the amount of rent due to the head landlord exist, the safer course is to apply for a reference to ascertain the amount, or the receiver may wait until the landlord makes an application on the subject, when he should appear by his solicitor, state the fact, and have the order shaped accordingly.(a)

Duty of Receiver when the Tenants are interfered with.
—When the receiver is informed by the tenants that the defendants have interfered with the rents, it is his duty to move for an attachment; and it is sufficient if he swear that he had the information from the tenants, and that he believes it.(b) The interference of the owner of the inheritance with the rents does not exempt the receiver from being charged with the whole amount, but he must discharge himself by showing what the owner of the inheritance received, or hindered him from getting.(c)

Duty of Receiver not to interfere between the Parties.
—The receiver ought not to interfere in any litigation between the parties. If he does so, he will not be allowed the costs of a motion for such a purpose. It is the duty of a receiver to receive the rents and collect the moneys without raising any controverted question between the parties.(d)

(a) *Ib.*(b) *Anon.*, 2 Moll. 499.(c) *Hamilton v. Lighton*, *Ib.*

499.

(d) *Comyn v. Smith*, 1 Hog. 81.

Applications in respect of the Estate should be made by the Persons beneficially entitled, not by the Receiver. —All applications to the court in respect of estates in the hands of a receiver should, as a general rule, be made on behalf of persons beneficially interested in the estate, and not by the receiver. A receiver ought not to present a petition or originate any proceedings in the cause.(e) If an application to the court become necessary, the receiver should apply to the party conducting the proceedings, or probably to any other party to the suit, at whose instance he may have been appointed, to make the necessary application. If after he has done so no application be made, and no proper means be taken to relieve the receiver from his difficulty, he may apply himself and will be entitled to his costs.(f) In a case where a receiver had incurred costs in the execution of his duties, and the parties to the suit had neglected for a long time to provide for them, it was held that he was justified in presenting a petition for payment.(g)

It must, however, be observed that, in several cases to be found in the books, receivers have even originated proceedings in their own name without any observa-

(e) *Miller v. Elkins*, 3 L. J. Ch. 128; *Ireland v. Eade*, 7 Beav. 55; *Parker v. Dunn*, 8 Beav. 498; see *Duke of Dorset* the concurrence of the committee. *Re Earl of Kilkenny*, 7 Ir. Eq. 594.

(f) *Ireland v. Eade*, 7 Beav. 55; *Parker v. Dunn*, 8 Beav. 498; see *Miller v. Elkins*, 3 L. J. Ch. 128.

(g) *Ireland v. Eade*, 7 Beav. 55.

Clarke v. Fisher, Ib. 684; *Evans v. Taylor*, Ib. 681. The receiver of the estate of a lunatic should not present a petition without

tions having been made as to the impropriety of such a course.(h)

In some cases, indeed, it is necessary that the receiver should join in the proceedings. Thus, if the receiver pay moneys in his hands to the solicitors of the plaintiff, who are also his own solicitors, without any previous instructions as to the specific application of the moneys, the moneys are to be considered to be paid to them as the solicitors of the receiver and not of the plaintiffs; and the receiver must be a party to an application for payment of the moneys into court by the solicitors.(i)

A party to a cause does not by being appointed receiver thereby lose his privilege as a party to the cause, and may apply to the court, as if he did not hold the office.(k)

(h) See *Mills v. Fry*, Coop. 107; *Wickens v. Townsend*, 1 R. & M. 361; *Birch v. Oldis*, Sau. & Sc. 146; *Cronin v. McCarthy*, Fl. & K. 49; *Evelyn v. Lewis*, 3 Ha. 472; see also *Shaw v. Rhodes*, 2 Russ. 539. It was said in an Irish case, that a receiver may file a bill to restrain waste if the case is urgent, without waiting for an order for the purpose, but that if the case is not urgent, he should apply to the court. *Nangle v. Lord Fingal*, 1 Hog. 142.

(i) *Chater v. Maclean*, 1 Jur. N. S. 175; see *Delfosse v. Crawshaw*, 4 L. J. Ch. N. S. 32; *Dixon v. Wilkinson*, 4 Drew. 614; 4 D. & J. 508.

(k) *Crisp v. Platel*, 2 Ph. 229.

Before leaving the general subject of the powers and duties of receivers a brief notice of some of the American authorities may be desirable, especially in view of the fact that in this country the powers of receivers have been extended both by statute and by judicial decisions. "In the progress and growth of equity jurisdiction," says Mr. Justice Swayne in *Davis v. Gray*, 16 Wal. 219, "it has become usual to clothe such officers with much larger powers than

were formerly conferred. In some of the States they are by statutes charged with the duty of settling the affairs of certain corporations when insolvent, and are authorized expressly to sue in their own names. It is not unusual for Courts of Equity to put them in charge of the railroads of companies which have fallen into financial embarrassment, and to require them to operate such roads until the difficulties are removed or such arrangements are made that the roads can be sold with the least sacrifice of the interests of those concerned. In all such cases the receiver is the right arm of the jurisdiction invoked. As regards the statutes, we see no reason why a Court of Equity, in the exercise of its undoubted authority, may not accomplish all the best results intended to be secured by such legislation without its aid."

In England, also, the tendency seems to be towards enlarging the scope of receiverships; see *Munns v. Isle of Wight Railway Co.*, L. R. 5 Ch. App. 414; *Pell v. Northampton and Banbury Junction Railway Co.*, 2 Id. 100; and *Cozens v. Bognor Railway Co.*, 1 Id. 594.

In *Davis v. Gray*, 16 Wal. 203 (affirming S. C. in 1 Woods, 420) the complainant, a citizen of New York, who had been appointed receiver of the Memphis, El Paso, and Pacific Railroad Company, filed a bill in the U. S. Circuit Court to restrain the governor and commissioner of the land office of the State of Texas from issuing any further patents to third parties for lands reserved to the company. By the terms of his appointment the receiver was authorized "to bring such suits in the name of said company or in the name of said receiver as he may be advised by counsel to be necessary and proper in the discharge of the duties of his office, and for acquiring, securing, and protecting the assets, franchises, and rights of the said company, and of the said receiver, and of securing and protecting the land-grant and land reservation of the said company." It was held that the complainant was entitled to the relief prayed for. See this case for a *résumé* on pp. 217-218 of the decisions upon the duties of receivers. See also *McNab v. Noonan*, 28 Wis. 434.

The rights of a receiver may sometimes rise higher than those of the party of whose property he has been appointed the custodian. Thus in *Talmage v. Pell*, 3 Selden, 328, following *Gillet v. Moody*, 3 Comst. 479, it was said that a receiver of an insolvent company was a trustee, not only for stockholders but for creditors also; and it was accordingly held that the receiver was entitled to repudiate an illegal transfer by the officers of the company's securities and claim them as part of the fund. See also *Porter v. Williams*, 5 Selden,

142; *Wilson v. Allen*, 6 Barb. 544; *McHarg v. Donnelly*, 27 Id. 103; *Osgood v. Laytin*, 3 Abb. App. Dec. 418; *Agricultural Bank v. Burr*, 24 Maine, 256. And although it was said in *Hyde v. Lynd*, 4 Comst. 393, that a receiver of the effects of a party who had made a transfer of property fraudulent as to creditors, could not avoid the grant, because his rights rose no higher than those of the fraudulent grantor; yet a different rule seems now be recognized. See *Foster v. Townshend*, 12 Abb. Prac. R. (N. S.) 469. In *Ruggles v. Brock*, 6 Hun, 164, it was held that a receiver of an insolvent corporation represented creditors as well as stockholders; and that in an action by him to recover unpaid subscriptions to stock, it was not a defence that the subscriptions had been obtained by misrepresentations. See also *Lathrop v. Knapp*, 27 Wis. 215; and *Butterworth v. O'Brien*, 24 How. Pr. R. 438. In Indiana, however, the rule in *Hyde v. Lynd*, seems to be followed. See *La Follett v. Akin*, 36 Ind. 1. So also in New Jersey under the act to prevent fraudulent trusts and assignments. See *Higgins v. Gillesheiner*, 11 C. E. Green, 308.

While a receiver is ordinarily but a custodian of the property, yet it is sometimes his duty, under order of court, to convert it into cash, and sales by receivers are frequent.

Thus, where property in which the complainant and defendant are both interested is likely to be sold by the party holding the legal title (the defendant) in a manner prejudicial to the interests of the complainant, the court will appoint a receiver to make the sale. *Marvine v. Drexel*, 18 P. F. Smith, 368. And see this case for form of order.

In sales by a receiver, a purchaser is not bound to inquire whether any errors intervened in the action of the court or irregularities were committed by the receiver in the sale. It is sufficient for him to see that there is a suit in equity, or was one, in which the court appointed a receiver of property; that such receiver was authorized by the court to sell the property; that a sale was made under such authority; that the sale was confirmed by the court, and that the deed accurately recites the property or interest thus sold. If the title to the property was vested in the receiver by the order of the court, it would in that case pass to the purchaser. *Koontz v. The Northern Bank of Kentucky*, 16 Wal. 196.

See further as to sales by receiver, *Simon v. Wood*, 45 How. Pr. R. 262; *National Bank of Metropolis v. Sprague*, 5 C. E. Green, 170; and *Lane v. Lutz*, 3 Abb. 19.

The intendment of the law is in favor of a reasonable authority on

the part of receivers. Thus, where the receivers of a bank transferred a promissory note which was part of the bank assets to a bank creditor, the presumption was that this disposition was within the scope of their authority, and that the creditor took a good title to the note. *Atchison v. Davidson*, 2 Pinney (Wis.) 48. See, however, *Mann v. Fairchild*, 3 Abb. App. Dec. 152.

A sale by a receiver should not be ordered by an inferior court, pending an appeal to a higher court. *McNab v. Noonan*, 28 Wisc. 434.

A receiver may under certain circumstances receive debts before they become due. *Olcott v. Heermans*, 3 Hun, 431.

Where a court has no power to make an order appointing a receiver, such an order may be reviewed on appeal. See *Fellows v. Heerenans*, 13 Abb. Pr. R. (N. S.) 1, and remarks of Allen, J., on page 3, and of Grover, J., on pp. 15 and 16. See, on this subject, note to p. 149; *Wilson v. Davis*, 1 Montana, 98; and *Barry v. Briggs*, 22 Mich. 201.

CHAPTER VIII.

LIABILITIES OF A RECEIVER.

A RECEIVER is responsible for any loss occasioned to the estate from his wilful default.(a)¹ If he places the moneys received by him in what he knows to be improper hands, he will have to answer the loss out of his own pocket.(b) A receiver, however, is not expected any more than a trustee or executor, to take more care of the property intrusted to him than he would of his own.(c) If he deposits the moneys for safe custody with a banker in good credit, to be placed to his account in the character of a receiver, he will not be answerable for the failure of the banker.(d) The money must, however, be deposited to the account of the receiver in that character, or be otherwise ear-

(a) *Skerrett's Minor*, 2 Hog. 192.

(b) *Knight v. Lord Plymouth*, 3 Atk. 480.

(c) 1 J. & W. 247; per Lord Eldon. Comp. *White v. Baugh*, 9 Bligh, 198.

(d) *Knight v. Lord Plymouth*, 3 Atk. 480; 1 Dick. 120; see

Rowth v. Howell, 3 Ves. 565; *Wren v. Kirton*, 11 Ves. 381;

Massay v. Banner, 1 J. & W. 247; *Salway v. Salway*, 4 Russ. 60.

¹ As a matter of course, a receiver cannot make a profit at the expense of the estate of which he is the custodian. Like other trustees, he cannot bid at his own sale; *Jewett v. Miller*, 10 N. York, 402. If he uses any of the trust property, he will be chargeable for the rent or hire thereof. *Battaile v. Fisher*, 36 Miss. 321.

marked. If a receiver pays money which comes into his hands as receiver to his private account with a banker, and not to a separate account as receiver, or otherwise mixes up the money which he collects as receiver with his own money, he shall be liable for the loss if the banker fails.(e)¹

If a receiver puts a fund out of his own control so that other persons shall be able to deal with it, he guarantees the solvency of those persons and becomes answerable for any loss that may ensue. It is immaterial that he may not have so far parted with the control as to enable the other person to deal with it without his concurrence, if he has parted with his exclusive control, by associating with himself the authority of another person.(f) A receiver in whom the court confides is not entitled to mix up with his delegated authority another person who is a total stranger to the court.(g) In a case, accordingly, where the receiver in order to obtain sureties had agreed that the money to be collected from the property over which he was receiver should be handed over to a person who was the partner of one of the sureties, and be deposited with bankers in the joint names of the sureties, and that all drafts upon the moneys so deposited should be written by the aforesaid partner and be signed by the receiver, it was held that the receiver

(e) *Wren v. Kirton*, 11 Ves. 381.

(f) *Salway v. Salway*, 2 R. & M. 219.

(g) *Ib.* 219.

¹ See *The Uliva Ins. Co. v. Lynch*, 11 Paige, C. R. 520.

was liable for the loss occasioned by the failure of the banking-house in which the money had been deposited. *(h)* If, indeed, a receiver parts with his control over the fund, by introducing the control of an irresponsible person who is unknown to the court, it seems that he shall be answerable for what has happened to the fund which he has so dealt with, not merely where the peril can be shown to be the cause of the loss, but where he has not conducted himself as a prudent person would have done. *(i)*

In a case where a receiver had paid moneys to the plaintiff's solicitor, with directions to pay them into court, which had not been done, the receiver was held liable for the loss, there being no sufficient evidence to show that the receiver had authority from the plaintiff to pay the moneys to the solicitor. *(k)*

If a receiver be in default for not passing his accounts and paying the balance within the proper time, or if, not being in default, he derives a benefit by the acceptance of interest on the balances which are from time to time in the hands of the banker, he is liable to make good any loss which may be occasioned by the bankruptcy of the banker, although the moneys may have been deposited to a separate account. *(l)*

A person who having assumed to himself improperly

(h) *Ib.*; S. C. in Dom. Proc. *Wilkinson*, 4 Drew. 614; 4 D. & nom. *White v. Baugh*, 2 Bligh, J. 508.

181; 3 Cl. & Fin. 44.

(l) *Drever v. Maudsley*, 8 Jur.

(i) *Ib.*

547; 13 L. J. Ch. 433; 3 L. T.

(k) *Delfosse v. Crawshay*, 4 L. J. Ch. N. S. 32; see *Dixon v.* 157; see *Shaw v. Rhodes*, 2 Russ. 539; *Wilkinson v. Bewick*, 4 Jur. N. S. 1010.

the character, neglects the duties of a receiver, whilst the parties interested considered him to be acting as receiver, makes himself responsible for any of the property which is lost through his neglect.(m) If rents be paid to a solicitor in the cause in his assumed character of a receiver, he will be ordered to pay them over to the proper receiver, and can claim no lien upon them either by virtue of an agreement with a party to the cause or for costs.(n)

If the receiver has paid moneys to the wrong person, and is afterwards obliged to pay the amount into court, and after due application thereof, a surplus remains, the court will not pay such surplus over to the person to whom the former payment was wrongfully made without satisfying the receiver's demands.(o) If, however, the wrongful payment be made by the receiver's agent, the receiver cannot have the benefit of such payment against the surplus, except subject to the liabilities of the agent to the person to whom the wrongful payment was made, and the accounts cannot be opened between those parties on petition of the executor of the receiver praying for repayment from the person wrongfully paid, or on default from the rents of the estate.(p)

A receiver appointed by a Colonial Court is liable to be sued by the person to whom the produce of the estate has been directed to be paid for an account of

(m) *Wood v. Wood*, 4 Russ. 558.

(o) *Gurden v. Babcock*, 6 Beav. 162.

(n) *Wickens v. Townsend*, 1 R. & M. 361.

(p) *Ib.* 157.

such produce; and the consignees of the produce to whom express directions have been given for its application are liable to be sued on the allegation that they are colluding with the receiver for the purpose of satisfying the claim against him out of moneys in their hands received from the estate and due to the plaintiff.^(q)

Upon motion on behalf of a late ward of court, charging that the accounts formerly passed were such as should not bind the applicant, and stating errors and neglect, the receiver was ordered to account again from the beginning.^(r)

Liabilities of Receiver to Third Parties for Misconduct in the Exercise of his Duties.¹—Although the court will

^(q) *Fitzgerald v. Stewart*, 2 Sim. 333. ^(r) *Wildridge v. McKane*, 2 Moll. 545.

¹ The subject of the liability of a receiver to third parties for injuries resulting from negligence in the discharge of his duties, was examined in *Camp v. Barney*, 4 Hun, 373, and the opinion of E. D. Smith, J., contains such a clear statement of the law and a full review of the authorities, that it is here given *in extenso*. The action was brought to recover damages for personal injuries received by the plaintiff while she was travelling from the town of Brockton, N. Y., to Corry, Penna., upon a railroad operated by the defendant as special receiver. The court said: "By the order appointing the defendant receiver, he was vested with all and singular the estate, franchises, property, and effects, of every name and nature and description, belonging to the Buffalo, Corry, and Pittsburg Railroad Company; and he was authorized to employ such assistants, operatives, mechanics, laborers, and firemen, as he might deem necessary; to purchase supplies; to borrow or hire such rolling stock, and make such running arrangements into connecting lines as he should deem necessary; and to operate the railroad of said company from Brockton to Corry; and

not allow the possession of its receiver to be disturbed without leave,(s) the court in its discretion will, if the

(s) *Supra*, p. 177.

that he have all the usual powers of receivers in like cases, as provided by the rules and practice of said court. At the close of the evidence in the case, the counsel for the defendant requested the court to decide, that inasmuch as the defendant was operating said railway as receiver only, and pursuant to the order aforesaid, he could not be made personally liable in this action for the injuries received by the plaintiff. The court then charged the jury that the defendant should be held in this action, to the ordinary liability of a common carrier of passengers by railroad, and also that the defendant was to be treated in this action as if the defendant at the time of the injury had been carrying on said railroad for his own personal benefit and advantage. To both these propositions, the defendant's counsel duly excepted. These exceptions all present substantially the single point, whether the defendant, being in fact a receiver of said railroad, can be held personally liable to the plaintiff for the injury for which this action was brought. No reasonable doubt I think can exist, if the action had been brought against the defendant as receiver by leave of the court appointing the defendant such receiver, that the action could be maintained. This point was distinctly decided by the Supreme Court of Ohio in the case of *Mears, Administrator, v. Holbrook et al., Receivers, &c., of the Columbus P. and I. R. R. Co.* (20 Ohio St. 137). It was there held that the receivers were the governing power, operating said railroad, and the only persons having authority to employ, direct, control, and dismiss the various agents employed by them to operate said railroad, and that the various employees of the said receivers were their servants and agents, and they were responsible for injuries resulting from their negligence in the discharge of their duties assigned to them respectively.

"The ruling at the Circuit was doubtless made upon the ground that the defendant being thus the acting, directing, and governing power in operating said railroad, and the only tangible principal known to the public, the plaintiff had a right to hold him responsible for the discharge of the duty of the common carrier in respect to her, as assumed when he received her money in payment for her safe transportation over said railroad, and that the contract was formally

misconduct of a receiver in the performance of his duty becomes the subject of proceedings in another

and nominally with him personally. This view of the defendant's liability is held in several cases in the Supreme Court of Vermont.

"In the case of *Blumenthal v. Brainerd et al.* (38 Vt. 407), the defendants were operating the Vermont Central, and Vermont and Canada Railroads, as receivers under the appointment of the Court of Chancery of that State, and claimed as the defendant does in this case, that they were only liable to account as officers of that court. The court held that the mere fact that the defendants were acting as receivers under the appointment of the Court of Chancery, could not be recognized as a defence to a suit at law for a breach of any duty or obligation which was assumed by them while acting as such receivers, and referred to the case of *Sprague v. Smith* (29 Vt. 421), where it was held that trustees operating a railroad and exercising its franchises, were responsible for the negligence of the operatives under their control.

"The same doctrine in respect to trustees operating a railroad was held in *Rogers v. Wheeler* (43 N. Y. 602; S. C., 2 Lans. 486), and in *Ballou v. Farnum* (9 Allen, 47). Executors and administrators also are personally liable upon all contracts made by them, after the death of the testator (*Ferrin v. Myrick*, 41 N. Y. 315). Receivers stand in the same general position with other trustees having an independent power of control in the affairs of business, and are primarily responsible for their affirmative acts and neglects and contracts, and for the negligence of those in their employ.

"The only exception in favor of receivers or distinction between them and other trustees, is, that they are officers of the court appointing them, and are under its control and protection. But this protection is only accorded to them on their own application, and is granted or refused by the court appointing them in its discretion, depending upon the circumstances of each case, as is held in the case of *Blumenthal v. Brainerd* (*supra*); Story's Equity, § 833; and *Parker v. Browning* (8 Paige, 388); *Angel v. Smith* (9 Vesey, 336). The case of *Morse v. Brainerd et al.* (41 Vt. 551) illustrates and confirms this view. In that case an action at law was commenced against the defendants who were in fact receivers, for the loss and damage sustained by injury to a car load of cattle transported over the road in charge of the said defendants as such receivers. That action was restrained by injunction from the Court

court, either itself take cognizance of the complaint, or leave the matter to be dealt with upon such pro-

of Chancery, and the cause of action was brought into that court and disposed of by a reference to a master.

"This was upon the assumption that it was no defence at law, that the defendants were officers appointed by and acting under the authority of the Court of Chancery. If the receiver in such case seeks the protection of the court by which he was appointed, he must, in proper form, invoke such protection by injunction, and it follows, I think, in such a case, that if the receiver does not ask for such protection from the proper court, the action may proceed against him at law, and he must be deemed to have waived, if need be, such ground of objection to the action, as to have voluntarily elected to defend the action at law, to the same effect as if leave had been given by the proper court to the institution of such suit at law. The Supreme Court of Massachusetts, recognized this principle in *Paige v. Smith* (99 Mass. 395), and held that as the defendants were liable to be sued at law in Vermont, they must be held so liable in that State. The action in this case was a proper one to be tried at law, and if application had been made to the District Court to restrain the action, I should think that court might very properly have refused such order, and allowed the cause to proceed to trial and judgment at law, and have directed the receiver to defend the same and abide by the decision of the court, and if it were of any practical consequence, I do not see why the record might not now be amended, and the judgment be entered and affirmed as against the receiver in form, to the same effect as if he had in fact been sued as receiver." See also *Louisville, &c., R. R. v. Cauble*, 46 Indiana, 277; *Allen v. Central R. R. Co.*, 2 Law & Eq. Rep. 202; *Kinney v. Crocker*, 18 Wis. 74; and *Potter v. Bunnell*, 20 Ohio St. 150.

In *Klein v. Jewett*, 11 C. E. Green, 474, the following language was used: "The rule may be considered settled that where an injury results from the fault or misconduct of a receiver appointed by a Court of Equity, while acting under color of the authority of the court, there being no dispute as to the power of the court to make the order under which he claims to have acted, the court may, in its discretion, either take cognizance of the question of the receiver's liability and determine it, or permit the aggrieved party to sue at law. But if the power of the court is disputed, the court then has no choice; it must assume exclusive jurisdiction and inhibit the aggrieved person from seeking redress against the receiver in any other

ceedings.¹ There is a clear and well-recognized distinction between cases where the jurisdiction of the court, or the validity and propriety of its orders or process is disputed, and cases where the authority of the court is admitted, but redress is sought against its officer for irregularity or excess in the performance of its orders. In the former case the court has no choice, but must draw the whole matter over to its own cognizance. In the latter case the court has an indisputable right to assume the exclusive jurisdiction; but may, if it think fit, on the circumstances being specially brought before it, permit other courts to proceed for punishment or redress.(t)

(t) *Aston v. Heron*, 2 M. & K. 396; see *Charlie v. Pickering*, 1 Keen, 749.

tribunal. *Aston v. Heron*, 2 Myl. & K. 390; *Parker v. Browning*, 8 Paige, 388." In this case the rule was laid down that the liability of a receiver operating a railroad is the same as that of the corporation, citing *Mears v. Holbrook* (*supra*).

Where a plaintiff, at whose instance a receiver was appointed to take charge of personal property, acted in good faith upon probable cause, he was held not liable for injuries done to the property while in the hands of such receiver. *Kaiser v. Kellar*, 21 Iowa, 95.

¹ *Parker v. Browning*, 8 Paige, C. R. 389. Permission of the court is necessary to warrant an action against a receiver. *De Groot v. Jay*, 30 Barb. 483. See, also, in the *Matter of Merritt*, 5 Paige, C. R. 131; *Merritt v. Lyon*, 16 Wendell, 405; and the cases cited in note, p. 206, *ante*. See, further, as to responsibility of receivers, *Commonwealth v. Franklin Ins. Co.*, 115 Mass. 278.

CHAPTER IX.

SALARY AND ALLOWANCES OF A RECEIVER.

A RECEIVER will, unless it is otherwise ordered, or unless he consents to act without a salary, be allowed a proper salary, or have allowances made to him for his care and pains in the execution of his duties.^(a)¹ The amount of the salary or allowance is not in general fixed until the passing of the first account, when the receiver will be allowed either a percentage upon his receipts, or a gross sum by way of salary.^(b)²

(a) Ord. XXIV. 1.

(b) Dan. Ch. Pr. 1581.

¹ In proceedings in bankruptcy a receiver is treated as the agent of the creditors, and the expenses of his trust cannot be charged against a mortgagee. *Ex parte Warren (In re Joyce)*, L. R., 10 Ch. App. 222.

² The subject of the compensation of trustees, executors, and other persons standing in a fiduciary capacity, is treated at length in the American note to *Robinson v. Pett*, 2 Leading Cases in Equity, 208. The amount of compensation is, in many of the United States, prescribed by statute; in others it is established by judicial decision. See, in this connection, *Gardiner v. Tyler*, 40 N. York, 508. As a general rule, it may be said that the allowance to receivers is measured by the same standard as that by which the compensation of other fiduciaries is regulated. See, however, *Gardiner v. Tyler*, 2 Abb. App. Dec. 247.

In New York, prior to the Revised Statutes, the usual allowance to receivers was 5 per cent. on amounts received and paid out—*i. e.*, 2½ per cent. on receipts and 2½ on disbursements. In the *Matter of The Bank of Niagara*, 6 Paige, C. R. 216-218. By the Revised Statutes the allowance to receivers of insolvent corporations was

Under very special circumstances an order has been made that the receiver should be allowed such salary as the judge might on passing each account think reasonable.(c)

The allowance to a receiver of the rents and profits of a landed estate is generally £5 per cent. on the gross amount received. This allowance may, however, be increased if there is any special difficulty in the collection; or diminished, or a fixed salary allowed,

(c) *Neave v. Douglas*, 26 L. J. Ch. 756.

fixed at a rate not higher than that allowed to executors and administrators. (And see *Muller v. Pondir*, 6 Lans. 472). This had been determined (by Chancellor Kent, in the *Matter of Roberts*, 3 John. C. R. 43) to be 5 per cent. on the first \$1000, 2½ per cent. on the next \$4000, and 1 per cent. on amounts over \$5000. This is a general rule which applies to receivers, executors, guardians, trustees, and all others who receive and pay out trust funds. The method of calculating the allowance is explained at length by Chancellor Walworth in the *Matter of Kellogg*, 7 Paige, C. R. 266; and see *Van Buren v. The Ins. Co.*, 12 Barb. 671.

In South Carolina the usual allowance to receivers is 5 per cent. on amounts received and disbursed. *Price v. White*, 1 Bailey, C. R. 240. In Massachusetts, the compensation of receivers is limited to "such an amount as would be reasonable for the services required of and rendered by a person of ordinary ability and competent for such duties and services, and should not be based upon the usages and rates of profit which prevail in any branch of commercial or other business, nor upon the special qualifications or standing of the person who may happen to perform the service." *Grant v. Bryant*, 101 Mass. 569-570.

The compensation of a receiver is not always graduated by a percentage on the amounts received by him, but somewhat by the duties and somewhat by the responsibilities of the situation. See *Cowdry v. The Galveston Railroad*, 1 Woods C. C. 331. In this case the receiver was allowed \$10,000 *per annum* in coin. See further on this subject *Jones v. Keen*, 115 Mass. 170; *Hutchinson v. Hampton*, 1 Mon. T. 39.

where the rental is considerable.(d) The subject of the proper amount to be allowed to a receiver was considered in *Day v. Croft*.(e) Lord Langdale, having inquired of the Masters what were the principles on which they acted and the practice adopted on this point in their several offices, thus states the result of his inquiries: "The Masters have each of them been good enough to furnish me with a certificate; and I find that there is no general rule which universally prevails as to the allowance to a receiver. Where the receipts consist of freehold and leasehold estates, £5 per cent. on the amount received is most frequently allowed. If there be any special difficulty in collecting the rents, on account of the sums being extremely small, or of the payments being frequent, as weekly payments, then the allowance is increased. On the other hand, if there should be very great facility in receiving the rents, then less than £5 per cent. is allowed. One of the Masters has certified to me a case where, after consideration, he allowed only £4 per cent. on the receipt of rents and profits of freehold and leasehold estates. Another Master has certified to me a case in which the sum paid to the receiver amounted to £300 for the first year; the receiver was afterwards allowed £150 only for a succession of years; which was afterwards reduced to £50 a year for the receipt of the same rents. It cannot, therefore, be considered as a universal or general rule that £5 per cent. should be allowed even upon the receipts of

(d) Set. on Deer. 1006; Dan. Ch. Pr. 1581. (e) 2 Beav. 491.

rents and profits. It may be increased if there be any extraordinary difficulty, or diminished if there be any extraordinary facility in the collection. With respect to other receipts, each Master considers himself bound to have regard to the degree of facility or difficulty there may be in receiving them. They have sometimes allowed $\text{£}2\frac{1}{4}$ per cent., but for gross sums of money this has been very much reduced, and $\text{£}1\frac{1}{4}$ per cent. has been allowed on many occasions. It appears, therefore, that the Masters, as they ought, consider upon each occasion what is fit, or proper to be allowed, having regard to the degree of difficulty or facility experienced by the receiver." In the case in which these observations were made, an objection was taken to an allowance which had been made to the receiver of $\text{£}5$ per cent. on certain large sums of money which had been paid to him for redemption of annuities, for interest upon mortgages and annuities, and it appearing that the particular circumstances and the particular nature of the items had not been brought to the attention of the Master, Lord Langdale thought there was sufficient in the case to warrant an order to review the report.

The practice of the Master's office as above stated is generally followed in the judge's chambers in fixing the salary or making an allowance to a receiver.(f)

A receiver is entitled out of the funds to his costs, charges, and expenses properly incurred in the discharge of his ordinary duties, or in extraordinary

(f) Dan. Ch. Pr. 1582.

services which have been sanctioned by the court.(g)¹ In a case where a receiver has paid sums out of his own pocket in satisfaction of legacies, he will be reimbursed.(h) So also in a suit to administer a West Indian estate, a consignee appointed by the court, who had become in advance to the estate, was held entitled to repayment out of the *corpus* of the estate, in priority to the costs of the suit.(i)

It is not necessary for a receiver to apply to the court for the payment of his costs, charges, and expenses properly incurred in the discharge of his duties.(k)

A receiver, it may be observed, has not such a vested right to the collection of moneys payable in respect of the estate as will entitle him to prevent the money being paid into court without passing through his hands, where poundage may be saved by a direct payment into court. Lord Langdale accordingly made an order on the petition of some of the parties interested, that a debtor who was willing to pay the amount of his debt to the Accountant-General at once, might be at liberty to do so.(l)

(g) *Malcolm v. O'Callaghan*, 3 M. & G. 52; *Fitzgerald v. Fitzgerald*, 5 Ir. Eq. 525.

(h) *Pulmer v. Wright*, 10 Beav. 236.

(i) *Morison v. Morison*, 7 D. M. & G. 215.

(k) *Fitzgerald v. Fitzgerald*, 4 Ir. Eq. 525.

(l) *Haigh v. Grattan*, 1 Beav. 201; *Weale v. Ireland*, 5 Jur. 405; see as to the practice in lunacy, *Ex parte Clayton*, 1 Russ. 476; *Ex parte Cranmer*, 1b. 477, n.

¹ See *Adams v. Woods*, 15 California, 206; *Devendorf v. Dickinson*, 21 How. Pr. R. 275; *In re Gomersall*, L. R. 20 Eq. 291; ante, notes to 206-7.

A receiver may be entitled to allowances beyond his salary for an extraordinary trouble or expense he may have been put to in the performance of his duties,^(m) or in bringing actions, or defending legal proceedings which have been brought against him.⁽ⁿ⁾ Where, for example, an adverse application had been made against a receiver by a party to the cause, which was refused with costs, the applicant being wholly unable to pay those costs, it was held that the receiver was entitled to be indemnified, and have his costs as between solicitor and client out of the fund in hand, although it belonged to incumbrancers.^(o)¹

(m) *Potts v. Leighton*, 15 Ves. 276. wait to apply for leave to defend an action till just before trial.

(n) *Re Montgomery*, 1 Moll. 419; *Bristowe v. Needham*, 2 Ph. 190; *Courand v. Hanmer*, 9 Beav. 3; see *Att.-Gen. v. Lewis*, 8 Beav. 179. *Anon.*, 6 Ves. 286. (o) *Courand v. Hanmer*, 9 Beav. 3; see *Att.-Gen. v. Lewis*, 8 Beav. 179.

¹ A receiver who acts as his own counsel is not entitled to make an extra charge for such services. Where, however, he employs counsel under proper circumstances, he will be allowed for their payment. In the *Matter of the Bank of Niagara*, 6 Paige, C. R. 213. See also *Buttaile v. Fisher*, 36 Miss. 321; *The Utica Insurance Co. v. Lynch*, 2 Barb. C. R. 573; *Ryckman v. Parkins*, 5 Paige, C. R. 545; and *Adams v. Haskell*, 6 Cal. 475. A receiver should not retain as his solicitor the counsel for a party to the suit. *Adams v. Woods*, 8 Cal. 319; *Ryckman v. Parkins*, 5 Paige, C. R. 543; *Ainsley's Petition*, 1 Edw. C. R. 576; *Ray v. Macomb*, 2 Id. 165; *Branch v. Sheffield*, 49 How. Pr. R. 196. But the receiver may do so if the parties have no objection, and a stranger is not entitled to object. *Warren v. Sprague*, 11 Paige, C. R. 200; 4 Edw. C. R. 416; and see *Smith v. The New York Stage Co.*, 18 Abb. Pr. R. 420. A receiver may be allowed his expenses and his counsel and witness fees in defending himself against a motion for his removal. *Cowdrey v. The Galveston Railroad Co.*, 1 Woods, 338. See this

So also where a receiver defended an action of law, and the defence was completely successful, the extra expenses were allowed, although the receiver had acted without the leave of the court.(p)

But if any extraordinary expenses have been incurred by the receiver, allowances for them will not be in general sanctioned, unless they have been incurred with the approbation of the court or judge,(q) or unless the estate has been benefited thereby.(r) Where accordingly a receiver without the leave of the court defended an action arising out of a distress for rent made by him, and compromised it on the terms of the plaintiff abandoning it, and each party bearing his own costs, he was disallowed his costs.(s) So also where the receiver of a lunatic's estate instituted proceedings in a wrong form of action, which he abandoned, and then adopted a form in which he succeeded, he was refused the costs of the abandoned proceedings, although the master reported that he had acted *bonâ fide*.(t)

The receiver is not entitled to be reimbursed the expenses of journeys to and residence in a foreign country for the purpose of prosecuting proceedings for

(p) *Bristowe v. Needham*, 2 Ph. 190; *Malcolm v. O'Callaghan*, 3 M. & C. 58.
 (q) *Re Ormsby*, 1 Ba. & Be. 629.
 (r) *Bristowe v. Needham*, 2 Ph. 190; see *Malcolm v. O'Callaghan*, 3 M. & C. 58.
 (s) *Swaby v. Dickon*, 5 Sim. 189.

(t) *Re Montgomery*, 1 Mol. 419.

case, also, as to the outlays which are within the discretion of a receiver of a railroad. Upon the general subject of allowances to receivers, see *Corey v. Long*, 12 Abb. Pr. R. (N. S.) 427.

the recovery of property belonging to the estate before the tribunals of that country, unless he has the express sanction and authority of the court for such journeys and residence.(u) If, however, the result of the suit be successful, and it appear that the success has been due to or has arisen from the presence of the receiver, it may be in the opinion of the court inequitable for the parties to take the benefit of the exertions of the receiver without defraying the expenses which had attended them, although no previous authority for incurring them had been given.(x) The fact that some of the parties interested may have given him authority, furnishes no ground for the court to allow his expenses out of the estate.(y)

If the property in dispute is small, the court may appoint a receiver without a percentage.(z)

If a trustee,(a) or party interested, ask leave to propose himself as receiver, he will be usually required to act without salary, unless by consent.(b) In a case, however, where a testator had appointed as trustee and executor a person who for many years had been the paid receiver and manager of his estate, the court appointed him as receiver at a salary, the tenant for life being an infant.(c)

Where a receiver is served with a petition in the cause, he should not appear, and will get no costs of

(u) <i>Malcolm v. O'Callaghan</i> , 3 M. & C. 52.	(a) <i>Sykes v. Hastings</i> , 11 Ves. 363; <i>supra</i> , p. 137.
(x) <i>Ib.</i> 58.	(b) Set on Decr. 1007; <i>supra</i> , pp. 136-137.
(y) <i>Ib.</i> 61.	(c) <i>Newport v. Bury</i> , 23 Beav. 30.
(z) <i>Marr v. Littlewood</i> , 2 M. & C. 458.	

appearance if he does so.(d) But where the receiver had incurred costs which the parties had long neglected to provide for, he was allowed to petition for the payment.(e)

If a receiver suffer any costs to accrue which ought to have been prevented, he will have to pay them out of his own pocket.(f)

The costs of drawing out a scheme of the estate and of the holdings of the tenants are chargeable, if at all, as part of the receiver's costs, and not of the solicitor's; but it seems that no allowance would be made to the receiver for such an item where he is paid by a percentage, though it may be necessary for the due performance of his duties.(g)

If the exertions of a receiver have been successful in creating a benefit to the estate, allowance will be made to him for the costs to which he has been put,(h) but no costs will be allowed of a defence improperly made,(i) or of a proceeding improperly taken and abandoned, though the receiver acted *bonâ fide* and succeeded in a subsequent proceeding.(k) In a case where the receiver of a lunatic's estate had instituted proceedings which, being wrong in form, he abandoned, and afterwards took proper proceedings which were

(d) *Hermon v. Dunbar*, 23 Beav. 312.

(e) *Ireland v. Eade*, 7 Beav. 55; *supra*, p. 222.

(f) *Cook v. Sharman*, 8 Ir. Eq. 515. See as to costs which receiver in Ireland, *Saddleir v. Greene*, 2 Ir. Ch. 330.

(g) *Re Callin*, 18 Beav. 511.

(h) *Bristowe v. Needham*, 2 Ph. 190; *supra*, p. 216.

(i) *Swaby v. Dickon*, 5 Sim. 681; *supra*, p. 216.

(k) *Re Montgomery*, 1 Moll. 419.

successful for the estate, the court refused to allow him the costs of the abandoned proceedings, although the master reported that the receiver had acted *bonâ fide* and ought to be allowed the costs.^(l)

Where an application by a defendant against a receiver was refused with costs, and the defendant was unable to pay the costs, the receiver was held to be entitled to deduct his costs as between solicitor and client from the balance in his hands.^(m)

If a receiver, without the leave of the court, pay out moneys to a judgment creditor of the party, over whose estate he has been appointed receiver under an order of a Court of Common Law, he will not be allowed the same in his accounts, if the moneys are not repaid by the judgment-creditor. He will also, along with the judgment-creditor, have to pay the costs of the motion.⁽ⁿ⁾

A receiver may, on its being ascertained to be for the benefit of the estate, be entitled to an allowance for money laid out on the estate without previous order.^(o)

In a case where the receiver's default in bringing in his accounts on the appointed days was known to the parties, and the accounts had been passed and poundage allowed without objection, no loss having been sustained by the receiver's fault, and no balance being due from him, the court would not afterwards listen

(l) *Ib.*

(n) *De Winton v. Mayor, &c.*

(m) *Courand v. Hanmer*, 9 *of Brecon*, 28 Beav. 204.

Beav. 3.

(o) *Supra*, p. 217.

to an application to strike out his allowance of poundage and cost at the instance of parties who had the benefit of his services;(p) but the amount of the allowance made to a receiver may be reconsidered, where, though an objection was originally made, the particular circumstances of the case and the nature of the items were not taken into consideration.(q)

Receiver may not make Interest on Balances in hand.—A receiver, though he passes his accounts and pays his balances regularly, is not entitled to make interest for his own benefit of moneys which come into his hands in his character of receiver, during the intervals between the times of passing his accounts.(r)

Life Estate subject to Expenses of Receiver.—If it is necessary, from the condition of the estate, not from the conduct of the parties, to have a receiver appointed over the estate of a tenant for life of real estate, it is an expense to which the estate for life is inherently subject. It is the right of the remainderman to have a receiver appointed, and to have the ordinary expenses of such appointment paid out of the life-estate.(s)

(p) *Ward v. Swift*, 8 Ha. 139; *Church*, 3 Bro. C. C. 40; *infra*, but see *infra*, p. 259. p. 253-254.

(q) *Day v. Croft*, 2 Beav. 481.

(s) *Shore v. Shore*, 4 Drew.

(r) *Shaw v. Rhodes*, 2 Russ. 510.

539; see *Earl of Lonsdale v.*

CHAPTER X.

ACCOUNTS.

Delivery of Accounts.—Under the old practice the accounts of a receiver were required to be delivered annually ;(a) but under the present practice the judge, to whose chambers the cause is attached, may, at his discretion, fix a longer or shorter period for a receiver to leave and pass his accounts.(b) The accounts must be delivered at the judge's chambers on the days appointed for the purpose.(c)¹

Form of Accounts.—The accounts should be made out in the prescribed form.(d) In the first account he passes, the receiver should state in the column for observations how each tenant holds, and every alteration should be noticed in the subsequent accounts.

(a) See Beames' Ch. Ord. 463. (c) Blox. 4; Dan. Ch. Pr.

(b) Ord. XXIV. 2. Where 1588.

the expenses of attending and (d) Reg. 8th August, 1857,
passing a receiver's accounts are Sched. No. 14; Blox. 30; Morg.
large, the court will direct the Ch. Ord. App. 74; 3 Dan. Ch. Pr.
accounts to be passed once a 1752.
year only. *Day v. Croft*, 20 L.
J. Ch. 423.

¹ The receiver, being an officer of the court, accounts to the court—not to any party in the cause. *Musgrove v. Nash*, 3 Edw. C. R. 172. He cannot be called upon to account to any court but that which appointed him. *Conkling v. Butler*, 4 Biss. 22.

In this column also should be entered any remarks the receiver may think proper to make as to the arrears of rent, the state of repairs, or otherwise.(e) If the account is drawn up in an irregular manner, the receiver may be ordered to draw it up in a proper form, and to pay the costs occasioned by his irregularity.(f) In a case where a receiver had been very irregular in passing his accounts, which were so prepared that neither the Master nor the parties interested could ascertain what was the real balance in the receiver's hands, inquiries were directed as to the amount of the balances in his hands on certain specified days in preceding years, and as to the sums due to the incumbrancers at those times, and the payments made to them. And the receiver was ordered to carry in his future accounts on or before a fixed day in every year, leaving at the same time an affidavit setting forth the particulars of his receipts and payments between the day to which the account was made up, and that upon which it was carried in, and setting forth the true balance then in his hands.(g)

Passing Accounts.—Upon leaving the accounts, a summons to proceed thereon is taken out by the receiver,(h) and served upon the solicitors of such

(e) Blox. 51; Dan. Ch. Pr. 1588; 3 Ib. 1752. If moneys have been paid to the receiver under protest, he must by affidavit distinguish them from the rest. *Brownhead v. Smith*, 1 Jur. 237.

(f) Dan. Ch. Pr. 1588.

(g) *Bertie v. Lord Abingdon*, 8 Beav. 53.

(h) Ord. XXIV. 3; see as to form of summons, 3 Dan. Ch. Pr. 1753. On leaving the first account, a copy of the order ap-

parties as are entitled to attend the passing of the accounts.⁽ⁱ⁾¹

In the absence of any directions made at the hearing of the cause, the court will not, on interlocutory application, make an order to restrain parties entitled to attend the passing of the accounts from attending, though the result would be a very large saving to the estate. If no directions have been given at the hearing, persons who are interested are entitled to attend the subsequent proceedings. The court cannot order that they should attend at their own expense, and that it should be unnecessary to serve them.^(k)

On the return of the summons the receiver's solicitor attends with the vouchers like any other accounting party, and the account is gone through before the Chief Clerk.^(l)² Any person who seeks to charge the

pointing the receiver, certified by	(i) Dan. Ch. Pr. 1588; Smith,
the solicitor to be a true copy	Ch. Pr. 1035.
thereof, must be lodged at cham-	(k) <i>Day v. Croft</i> , 14 Beav. 29;
bers, if not previously done; Dan.	20 L. J. Ch. 423.
Ch. Pr. 1588 n.; see as to form of	(l) Smith, Ch. Pr. 1035; Dan.
certificate, 3 Ib. 1174.	Ch. Pr. 1143 <i>et seq.</i>

¹ *Mechanics' Bank v. Bank of New Brunswick*, 2 Green, C. R. 437.

² A receiver is an officer of the court, as well as a Master, and states his own accounts, and submits them to a Master for inspection under the order of the court; the Master acting in place of the court in a judicial, rather than a ministerial capacity. Strictly speaking, exceptions to his report in such cases do not properly lie, as they do to an account stated by himself, as in the case of executors, administrators, trustees, or partners, who are ordered to account before him. Nevertheless, if the Master adopt any erroneous principle in allowing a receiver's account, the court on petition of the proper parties will refer the matter back to him for correction. *Cowdry v. The Galveston Railroad Company*, 1 Woods, 334.

receiver beyond the amount of which he has admitted the receipt, should give him notice of his intention, stating, as far as he can, the amount sought to be charged and the particulars thereof, in a short and succinct manner.^(m)

The receiver brings in also his bill of costs upon passing the account. The bill is then taxed, and the amount included in his disbursements. On passing his first account, the receiver's costs of completing the appointment are taxed and allowed.⁽ⁿ⁾ Parties attending the passing of a receiver's accounts only have costs from the receiver after a decree disposing of the costs of the suit and showing who is intitled to costs out of the rents; in other cases the costs of the parties are costs in the cause.^(o) Where the parties are entitled to have their costs paid by the receiver, such costs are taxed at chambers and paid by the receiver, and included in his account.^(p)

If the receiver brings in his account, but fails to take out a summons to proceed upon it, the party prosecuting the order takes out and serves on the receiver's solicitor a summons to show cause why his accounts have not been passed, and to proceed to pass the accounts. If the receiver does not attend, the Chief Clerk allows the sums wherewith the receiver

^(m) Ord. XXXV. 34.

^(o) Blox. 52.

⁽ⁿ⁾ Dan. Ch. Pr. 1588; Smith, Ch. Pr. 1035; see as to scale of costs, Reg. 8th August, 1857, Sched. No. 15; Morg. Ch. Ord. App. 76.

^(p) Dan. Ch. Pr. 1589; see as to scale of such costs, Reg. 8th August, 1857, Sched. No. 15; Morg. Ch. Ord. App. 76; Blox. 32.

has charged himself, and disallows such of his payments as he has failed to vouch.(q)

The receiver is usually directed to hand copies of his accounts to such of the parties as are entitled to attend upon the passing thereof, and to charge for the same in his costs.(r) A plaintiff or defendant entitled to attend a receiver's account is not allowed in costs a copy of the account, if his solicitor is also the solicitor for the receiver.(s)¹

Allowance of Accounts.—When the account is passed, it is entered by the solicitor of the receiver in a book called “the receiver's book,” and also in a book which is the property of the receiver. The entry in each book must be verified by the affidavit of the receiver, and the affidavit must refer to the account as an exhibit, and not be annexed to it.(t) The books, with an office copy of the affidavit, are then left at the judge's chambers, and a memorandum of the allowance

(q) Smith, Ch. Pr. 1036; Set. ings. *Dixon v. Wilkinson*, 4 on Decr. 1020; see *Drever v. Drew*, 619. [*Adams v. Woods*, 8 California, 319–320; and cases

(r) Dan. Ch. Pr. 1588. cited in note to page 241, ante.]

(s) *Sharp v. Wright*, L. R. 1 (t) Ord. XXIV. 3; XXXV. Eq. 634. See observations of 33; Smith, Ch. Pr. 1035; Dan. Kindersley, V. C., as to the im- Ch. Pr. 1589; see as to form of propriety of the same solicitor affidavit, Reg. 8th Aug. 1857, acting for the receiver and the Sched. No. 17; Blox. 35; Morg. party conducting the proceed- Ch. Ord. App. 78.

¹ Question as to payments to proper parties and allowance of proper credits should be raised on the settlement of a receiver's accounts. They should not be made the subject of a subsequent action. *Olcott v. Heermans*, 3 Hun, 431.

of the account is written at the foot of it and signed by the Chief Clerk.^(u)

The book called "the receiver's book" is retained in chambers until the completion of the receivership, when it is deposited at the Record and Writ Clerk's Office.^(v) The other is delivered back from time to time to the receiver.

Certificate of Allowance.—After the allowance of the account, a certificate of the allowance, stating the balance due from the receiver, and the days on which it is paid into court,^(x) is then made and signed by the Chief Clerk, and approved and signed by the judge without delay, and, upon being so signed, is left at the Report Office, and forthwith acted on.^(y)

The rules concerning the time and manner in which the opinion of the judge may be taken upon any proceedings as to which the Chief Clerk's certificate has not been signed and adopted by the judge, do not apply to certificates upon passing receivers' accounts. Such certificates may be approved and signed by the judge without delay, and, upon being so signed, shall

(u) Dan. Ch. Pr. 1589; Smith, Ch. Pr. 1035; see as to form of memorandum of allowance, 3 Dan. Ch. Pr. 1755.

(v) Ord. XXIV. 4.

(x) See Ord. XXIV. 2.

(y) Ord. XXXV. 46, 47, 48, 54, 55; Dan. Ch. Pr. 1589; see as to form of certificate of allowance 3 Dan. Ch. Pr. 1754. The certificate bears a £1 stamp, and also proper stamps for the further

fee of 10s. in respect of each £100 of the net balance received, after deducting all necessary outgoings for rent, taxes, rates, repairs, and management of the property. Sch. to Consul. Ord. 4; see as to the practice before this order, *Wells v. Wales*, 4 D. M. & G. 816; *Wastell v. Leslie*, 1b. 818 n.; *Buckmaster v. Buckmaster*, 28 L. J. Ch. 564.

be filed and forthwith acted upon.(z) This provision follows the old practice under which the Master's report of the receiver's account required no confirmation,(a) and therefore did not admit of exceptions.¹ Hence the court would not enter into the consideration of any of the items of the account, but would, upon the petition of the party complaining, examine any principle upon which the Master had proceeded when error was imputed to him.(b)

Receiver must pay in Moneys.—Where the certificate directs a payment to be made into court, the solicitor for the receiver should obtain an office copy of the certificate, and leave it at the Accountant-General's office, together with the order directing the payment of the receiver's balances into the Bank, and obtain a direction for such payment. The amount is paid on such direction in the usual manner.(c)

Although a receiver is only bound by his recognizances to pass his accounts at the periods appointed by the judge, he may at any time apply to the court to pay in moneys in his hands; and if in the intervals between passing his accounts he receives sums of such

(z) Ord. XXXV. 54.

in a receiver's accounts, though

(a) 2 P. W. 729; *Shewell v. Jones*, 2 Sim. & St. 170; 3 Russ. 522.

an erroneous principle be not adopted; *Beylagh v. Concanon*, 10 Ir. Eq. 351.

(b) *Shewell v. Jones*, Ib. In Ireland objections are entertained to the amount of the items

(c) Dan. Ch. Pr. 1589; Smith, Ch. Pr. 1037.

¹ This practice was adopted in *Brower v. Brower*, 2 Edw. C. R. 621.

an amount as to make it worth while to lay them out, he ought to apply by summons for an order to pay them into court, that they may be productive for the benefit of the estate.(d) If the receiver keep in his hands moneys which he was directed to pay in, it is no excuse for him to say that the circumstances of the estate made it necessary to keep large sums in hand, nor will it prevent the court from directing an inquiry as to what sums might or ought to have been reasonably laid out at interest.(e) Where the order for appointing a receiver does not provide for the payment of his balances into the bank, the receiver will not be allowed to avail himself of the omission and to keep a balance in his hands without interest, under a pretence of waiting for some party in the cause to obtain an order upon him for payment.(f) He ought to apply by summons, which should be served on the parties to the cause, for an order for that purpose, and that the costs be allowed him in his next account; and unless he does so, the court will charge him with interest.(g)

Order at Suit of Parties interested that Receiver pass his Accounts or pay in the Balance.—If a receiver makes default in leaving or passing his accounts, or in paying in the balance found due from him at the appointed time, any party interested in the accounts may apply

(d) *Shaw v. Rhodes*, 2 Russ. 539; see as to form of summons, 3 Dan. Ch. Pr. 1758.

(e) *Hicks v. Hicks*, 3 Atk. 274.

(f) *Potts v. Leighton*, 15 Ves. 273, 274; see 1 Ba. & Be. 230.

(g) Dan. Ch. Pr. 1590. See as to form of the summons, 3 Dan. Ch. Pr. 1759.

by summons that he may leave his account or pay in the balances within a limited time (usually four days) after service upon him of the order to be made on the summons, and pay the costs of the application.^(h) The summons must be served on the receiver, and if he does not appear, the order will be made, on production of an affidavit of the service of the summons; or where the default consists in not making a payment into court, of the order and certificate under which such payment is to be made; and the Accountant-General's certificate of such default must be produced in support of the application.⁽ⁱ⁾ The order is drawn up by the registrar, and an indorsed copy must be served personally on the receiver;^(k) or, if personal service of the order cannot be effected, an order giving leave to substitute service should be obtained at chambers on an *ex parte* application by summons, supported by affidavit, and the order must be served in conformity with the directions thereby given.^(l) If after such original or substituted service the receiver neglect to obey the order, it may be enforced against him by process of contempt.^(m) A similar course should be

^(h) Ord. XXXV. 23; Dan. Ch. Pr. 1590. Creditors after a decree may make an application to compel a receiver to bring in his accounts; *Locke v. Ash*, 1 Hog. 143; see as to form of summons, 3 Dan. Ch. Pr. 1757, 1760; see as to form of order, Set. on Decr. 1018.

⁽ⁱ⁾ Ord. XXXV. 23; Dan. Ch. Pr. 1590.

^(k) Ord. XXIX. 2, 3.

^(l) Dan. Ch. Pr. 1591.

^(m) *Ib.*; Ord. XXIX. 2, 3; Set. on Decr. 1020; see as to order *nisi* for committal, *Davies v. Cracraft*, 14 Ves. 143; *Scott v. Platel*, 2 Ph. 229; see as to order absolute, *Blair v. Toppitt*, Set. on Decr. 1019; see as to whether attachment can be issued against a receiver, Dan. Ch. Pr. 1591 n.

pursued against a receiver who is directed to pay his balance to the parties instead of into court, and neglects to do so. It is irregular to issue a writ of *fi. fa.* for such balance.(n)

The four days' order may be had by one of several joint receivers against another who is in default. For though the receivers be duly bound to account jointly, each of them must bring in his accounts of what he individually receives, and so long as one of them is in default, the four day order is of course.(o)

A receiver may be ordered to pass his accounts and pay over the balance, although the bill has been dismissed,(p) or the proceedings have been ordered to be stayed.(q)

Disallowance of Salary and Charge of Interest for Non-payment, or not leaving Accounts.—Where a receiver neglects to leave or pass his accounts and pay balances thereof at the times fixed for the purpose, the judge before whom such receiver has to account will, from time to time, when his subsequent accounts are produced to be examined and passed, not only disallow the salary therein claimed by such receiver, but also

(n) *Whitehead v. Lynes*, 34 Beav. 161; *affd.* 12 L. T. N. S. 332. A writ of *fi. fa.* having been put in execution against a receiver to compel payment of moneys which he had neglected to pay, the court, on the desire of the defendant, would not itself assess the damages sustained by the receiver, but ordered that the matter should be tried and the damages assessed in an action at law; *Ib.* 34 Beav. 165.

(o) *Scott v. Plutel*, 2 Ph. 229.

(p) *Pitt v. Bonner*, 5 Sim. 577; see *Hutton v. Becton*, 9 Jur. N. S. 1339.

(q) *Paynter v. Carew, Kay*, App. 36, 44.

charge him with interest after the rate of £5 per cent. per annum upon the balance so neglected to be paid by him, during the time the same shall appear to have remained in his hands.(r)

In the case of a receiver of annual rents and profits, he will be charged with interest from the time of receipt;¹ but in a case where a receiver was appointed of the personal estate of a testator, the court would not charge him with interest on each sum from the time it was received, but charged him as an executor would be charged; that is, by making yearly or half-yearly rests in his account.(s)

The same remedies appear to be available against a receiver after he has been discharged. In a case where a receiver who had been discharged had not paid in his balance, he was ordered to pay in the same, and also the amount allowed for his salary, together with interest on both sums at £5 per cent. from the day appointed, and to pay the costs of the application.(t) Where, however, default has been made by the execu-

(r) Ord. XXIV. 2; *Bristowe v. Needham*, 9 Jur. N. S. 1168; 11 W. R. 926; see as to the practice before the Order of April, 1796, *Fletcher v. Dodd*, 1 Ves. Jr. 85; see as to the practice under the order of April, 1796, — *v. Jolland*, 8 Ves. 72; *Potts v. Leighton*, 15 Ves. 277; *Brownhead v. Smith*, 1 Jur. 237; see as to the practice of the Court of Chancery in Ireland, *Purcell v. Woodley*, 10 Ir. Eq. 422; *Dease v. Reilly*, 4 Dr. & War. 284. (s) *Potts v. Leighton*, 15 Ves. 277. (t) *Harrison v. Boydell*, 6 Sim. 211.

¹ See *Weems v. Lathrop*, 42 Tex. 207.

tors of a deceased receiver, the sureties were only ordered to pay interest at £4 per cent.(u)

A receiver may be charged with interest on moneys improperly kept in his hands, although he has passed his accounts, and all parties have expressed themselves satisfied ; and for this purpose an inquiry what money he has received from time to time, and how long he has kept it in his hands, may be directed ;(x) and in — v. *Jolland*,(y) Lord Eldon appeared to think that if such a case should be brought before him, he should direct a receiver to make good any loss which might be occasioned from a difference in the price of the funds between the time when the receiver's balance was paid in and the times when they ought to have been paid in.

In *Hicks v. Hicks*,(z) where a receiver had been appointed during the minority of an infant who had no guardian, and was directed to place out the surplus rents and profits, when they should amount to a competent sum, with the approbation of the Master, on Government or other securities, but omitted so to do, Lord Hardwicke directed that he should pay interest at the rate of £4 per cent. on the surplus rents and profits from the date of the decree until the infant came of age, although the infant two days after he came of age settled accounts with the receiver, who

(u) *Clements v. Beresford*, 10 Jur. 771.

(y) 8 Ves. 72, 73.

(z) 3 Atk. 279.

(x) *Fletcher v. Dodd*, 1 Ves. Jr. 85.

delivered up his vouchers and gave him copies of all the accounts passed by the Master.

It seems to have been considered by the Masters that they were not bound to be actors in applying the General Order of April, 1796, upon which the present Order XXIV. 2, is founded, and that unless the objection to the allowance of poundage to the receiver was raised by the parties before the Masters, the court would not, as far as regarded poundage and costs properly incurred, open the report of the Master; *(a)* but it is not quite so clear that this was always the rule, *(b)* nor does such a construction appear to be consistent with the peremptory terms of the order. *(c)*

Accounts of Deceased Receiver.—An order may be obtained at chambers for the executors of a deceased receiver to be at liberty to pass his accounts and pay in the balance. *(d)* In a case where, on the executors' application, liberty had been given them to pass their accounts and pay in the balance, they were not allowed after the lapse of many years to object to the order on the ground of want of assets. *(e)*

The order cannot, however, be obtained, except upon the consent of the executors. If the executors do not

(a) *Ward v. Swift*, 8 Ha. 142. on Decr. 1022; see 15 Sim. 483;

(b) See *Potts v. Leighton*, 15 Ves. 276. see as to form of summons, 3 Dan. Ch. Pr. 1761.

(c) See *Bristowe v. Needham*, 9 Jr. N. S. 1168; 11 W. R. 926. *(e)* *Gurden v. Badcock*, 6 Beav. 157.

(d) *Littleboy v. Spooner*, Set.

consent, the court has no jurisdiction to order in a summary way that they shall bring in and pass his accounts, and pay the balance out of his assets.(f) The proper course to follow, if the recognizance cannot be put in suit, is to file a bill against them for an account.(g)

The admission by the executor of a receiver of assets to answer what is due from his testator is sufficient to make the executor liable to pay such interest as the receiver's estate may be charged with in respect of the moneys produced by the rents retained in his hands.(h) But if there has been laches of the parties, the executor will only be ordered to pay in the principal money and the costs of the application.(i)

Putting Recognizance in Suit.—Where the receiver neglects to bring in his accounts, or, having brought them in, fails to pay the balance certified to be due from him within the time limited, if he has been proceeded against to a contempt, the party prosecuting the contempt may put the recognizance in suit against the sureties. But he is not at liberty to sue the sureties until he has proceeded to get the receiver into contempt, unless the receiver has become bankrupt, or unless he is prepared to show that such proceedings would be useless.(k)

(f) *Jenkins v. Bryant*, 7 Sim. C. C. 616; *Tew v. Lord Winton*, 171; see *Ludgater v. Channell*, 15 Sim. 482; 3 Mac. & G. 180. (i) *Gurden v. Badcock*, 6

(g) *Ludgater v. Channell*, 15 Beav. 157. (k) *Smith*, Ch. Pr. 1037.

(h) *Foster v. Foster*, 2 Bro.

The recognizance being given to the Master of the Rolls, and the senior Vice-Chancellor for the time being,^(l) it cannot be enforced without the leave of the court; and whether or not it shall be enforced is a matter for the discretion of the court.^(m) An order accordingly must be obtained to authorize the proceeding. This order is usually obtained on summons which must be served personally on the receiver, or his representatives, and the sureties also, if they are to be proceeded against.⁽ⁿ⁾

An order for leave to put the recognizance in suit having been obtained, the next step is to proceed by *sci. fa.*, in the names of the Master of the Rolls and senior Vice-Chancellor, or other the cognizees named in the recognizance, or the survivor of them, or the executors or administrators of the survivor,^(o) against the cognizers therein named, or any of them, or their respective heirs, executors, or administrators.^(p)

Upon the death of a receiver, the parties interested may come to the court either against his representatives or against his sureties, and they should in the first place apply against both, to avoid the objection which each might raise to the absence of the other. The court, therefore, without deciding which of these

(l) *Supra*, pp. 160, 161.

(o) Set. on Decr. 1019.

(m) 1 Dr. & War. 226; 3 Mac. & G. 178.

(p) Dan. Ch. Pr. 1594; see as to proceedings by *sci. fa.*, 1b.

(n) *Thurlow v. Thurlow*, 4 Jur. 982; Dan. Ch. Pr. 1593; see as to form of summons, 3 Ib. 1762; see as to order in such case, Set. on Decr. 1018.

1595, 1596, 1597, 1598, 1599; see also, as to form of writs, &c., in proceedings by *sci. fa.*, 3 Ib. 1763 -1772.

parties are primarily liable, will order on petition that the deceased receiver's recognizance may be enforced against his real and personal representatives and sureties, notwithstanding an alternative prayer that the personal representatives may pass the accounts.(q)¹

It was laid down by Shadwell, V.-C., on the authority of the registrars, to be the practice not to put the recognizance in suit against the surety in default of the receiver paying what was due from him without the amount being first ascertained, except where the receiver had absconded; and that a breach of the recognizance by non-payment of the balance reported due from the receiver ought to be shown as a ground for granting an application for liberty to put the recognizance in suit;(r) but Lord Truro thought that the recognizance may also be enforced against the surety in the case of a deceased receiver without ascertaining the amount due, when there is no means of ascertaining or enforcing the claim. The case of an absconding receiver, as put by the registrars, he regarded as only an example of an exceptional case in which it was difficult to ascertain the amount due.(s)

(q) *Ludgater v. Channell*, 3 Mac. & G. 175.

(r) *Ib.*; 15 Sim. 480.

(s) *Ib.*; 3 Mac. & G. 180.

¹ See *Weems v. Lathorp*, 42 Tex. 213.

CHAPTER XI.

DISCHARGE OF A RECEIVER.

To divest the possession of a receiver, an application to the court for his discharge is in general necessary.^(a) The appointment of a receiver, however, made previous to a decree, will be superseded by it, unless the receiver is expressly continued.^(b) So, also, an injunction to put a purchaser into possession is in itself a discharge of the order for a receiver as to the lands mentioned in the injunction.^(c)¹ So, also, where the estate expires over which a receiver has been appointed, the reversioner or remainderman need not apply to have the receiver discharged, for the legal estate vesting in possession, and there being an indisputable right to enter,

(a) *Thomas v. Brigstocke*, 4 Russ. 64; see *Newman v. Mills*, Decr. 1003.

1 Hog. 291.

(c) *Ponsonby v. Ponsonby*. 1

(b) Dan. Ch. Pr. 1601; see Hog. 321; *Anon.*, 2 Ir. Eq. 416. *Reeves v. Neville*, 10 W. R. 335;

¹ So, also, where a decree was made in a cause, in which a receiver had been appointed, authorizing and directing one of the parties to take certain goods from the receiver, and the party refused to take the goods, or withdraw them from the custody of the receiver, it was decided that the latter held the property specified only as the trustee for the party, and not as receiver, although there had been no formal order of discharge. *Very v. Watkins*, 23 How. 475.

it is not necessary there should be an order discharging the receiver.(d)

Discharge of Receiver on his own Application.—When a receiver has been appointed and has given security, he cannot be discharged upon his own application without showing some reasonable cause why he should put the parties to the expense of a change.(e)¹ If, however, he can show reasonable cause for his discharge, he will be allowed to deduct the costs of and incidental to the application for discharge out of the balance in hand.(f) Infirmary, which prevents the receiver from properly performing his duties, and ill health increased by the anxieties of the duties of his office, afford a sufficient excuse for his discharge.(g)

A receiver who wishes to be discharged, and cannot show any reasonable cause for putting the parties to the expense of a change, will not be discharged at his own request, unless on the terms of his paying the costs of the appointment of another receiver and consequent thereon.

A receiver ought not to present a petition to be discharged to come on with the cause on further directions, as the court will make an order on further directions without any such petition. The costs of the petition will be refused.(h)

(d) *Britton v. McDonnell*, 5 Ir. Eq. 275; *Re Stack*, 13 Ir. Ch. Madd. 266.

213.

(g) *Ib.*

(e) *Smith v. Vaughan*, Ridg. temp. Hard. 251.

(h) *Stilwell v. Mellersh*, 20 L. J. Ch. 356.

¹ See *Beers v. The Chelsea Bank*, 4 Edw. C. R. 277.

Discharge of Receiver on Satisfaction of Incumbrance.

—A receiver is generally continued until the decree;¹ but if the right of the plaintiff ceases before that time, the receiver may be discharged, and cannot be continued at the instance of a defendant.⁽ⁱ⁾ In a case, accordingly, where a receiver had been appointed at the suit of an annuitant, and the plaintiff had been satisfied by the payment of his demand, Lord Eldon held that the order for a receiver must be discharged, although the discharge was opposed by two creditors having prior annuities to the plaintiff. “With the right of the plaintiff to have a receiver,” he said, “must fall the rights of the other parties. It would be most extraordinary, if, because a receiver has been appointed on a behalf of the plaintiff, a defendant is entitled to have a receiver appointed on his behalf.”^(k)²

⁽ⁱ⁾ *Davis v. Duke of Marlborough*, 2 Sw. 167, 168. *Largan v. Bowen*, 1 Sch. & Lef. 296; *Murrough v. French*, 2

^(k) *Ib.*; see *Sankey v. O'Maley*, Moll. 498.
2 Moll. 421; but see 2 Sw. 118;

¹ Ordinarily the appointment of a receiver continues during the pendency of the suit until a decree is rendered; and where the term of his office is intended to be limited, that intention should be expressed in the order. *Weems v. Lathrop*, 42 Tex. 210.

² This subject was discussed and the authorities reviewed in *Beverley v. Brooke*, and *Beverley v. Scott*, 4 Grattan, 187. Actions had been instituted by conflicting claimants of a trust fund, and a receiver appointed in one. It was held that the appointment should enure to the benefit of the plaintiff in the other action upon the establishment of his superior right to the fund; and the court repudiated the idea that a receiver could not be continued for the benefit of parties other than the complainant in the cause. See the remarks of Baldwin, J., in pp. 223-224.

And so in *Whiteside v. Prendergast*, 2 Barb. C. 472, the Chan-

In other cases, however, of a somewhat similar character, proceedings have been stayed without prejudice to the order appointing a receiver.^(l)

Discharge of Receiver on his Continuance being unnecessary.—If, during the course of the proceedings, the continuance of a receiver becomes unnecessary, he will be discharged. Thus, in a case where a receiver had been appointed in consequence of the misconduct and incapacity of trustees under a will, he was ordered to be discharged on the appointment of new trustees who undertook to enter into a recognizance to account half-yearly in the same way as a receiver, and agreed to act without a salary.^(m) So, also, in a case where a receiver, who had been appointed by reason of the executors having refused to act under a testator's will, quitted his place of residence in the vicinity of the estates in respect of which he had been appointed receiver, the court, on the consent of the other parties to the cause, and the executors expressing their willingness to act, made an order that the receiver should

(l) *Damer v. Lord Partarling*. (m) *Bainbrigge v. Blair*, 3 *ton*, 2 Ph. 34; *Paynter v. Carew*, Beav. 421, 423. 18 Jur. 419; see *Murrough v. French*, 2 Moll. 498.

cellor (Walworth) approved of *Murrough v. French*, and *Largan v. Bowen* (*supra*, note k), and said that "if the protection of the rights of a defendant requires the continuance of a receiver, the court will not grant a discharge, although the suit is at an end; but it will require the defendant thus protected to file a bill forthwith to settle his rights." See also on the general subject, *Milwaukee, &c. R. R. Co. v. Souther*, 2 Wallace, 510.

pass his accounts.(n) So, also, in a case where a receiver had been appointed at the suit of an annuitant, he was discharged on the payment of the arrears of the annuity, there being no reason, under the circumstances of the case, why he should be continued.(o)¹

Other Causes for discharging a Receiver.—A receiver is liable to be discharged for irregularity in carrying in his accounts, and for making it necessary for compelling him to do so, and for so passing his accounts that the amount of the balance in his hands cannot be ascertained.(p)

It seems that a charge of misbehavior against a receiver for suffering the owner of the estate to remain in part possession, to the prejudice of the estate, will not be admitted as a reason for discharging the receiver, because the parties themselves have caused the loss by not compelling the owner by the authority of the court to deliver up possession to the receiver.(q)

Where a receiver becomes bankrupt, he will be discharged and a new receiver appointed.(r)

(n) *Davy v. Gronow*, 14 L. J. Ch. 134.

(o) *Braham v. Strathmore*, 8 Jur. 567.

(p) *Bertie v. Lord Abingdon*, 8 Beav. 53.

(q) *Griffith v. Griffith*, 2 Ves. 400.

(r) Dan. Ch. Pr. 1601.

¹ When a railroad company, whose property has been placed in the hands of a receiver shall satisfy the Chancellor of its ability and readiness to operate the road, the receiver will be ordered to deliver it up. *In re Long Branch and Seaside R. R. Co.*, 9 C. E. Green, 398-401. But it must also show that it is entitled to the possession. *Id.* 402.

Discharge of Receiver over Estate of Infant.—In the case of an infant, it is not right to vacate the recognizance of a receiver appointed in his behalf on his coming of age, and the receiver passing his accounts, for defalcations are sometimes found after a great length of time; and if it be proved twenty years after that a receiver has not accounted for what he has received, the money might be recovered under the recognizance if it has not been vacated.^(s) Lord Kenyon held that a receiver should not have his recognizance discharged till one year after the infant has attained his age of twenty-one, and Lord Eldon approved of the rule.^(t)

Discharge of Receiver of Estates decreed to be sold.—Where estates have been decreed to be sold, the receiver will be continued until the conveyances are executed under the decree, in order that he may collect the arrears of rent.^(u) In this case the party refused to execute a conveyance, as there were arrears of rent due, and he would thereby extinguish his remedy, but the court directed the receiver to be continued in regard to those rents down to the day of executing the conveyance before the purchaser should be let into possession, and directed the tenants to be compelled to pay their arrears in the name of the receiver according to the course of the court.^(v)

^(s) *Atton*, cited 2 Madd. Ch. 298.

^(t) *Ib.*

^(u) *Quinn v. Holland*, Ridg. temp. Hard. 295.

^(v) *Ib.*

Receiver not discharged until Balance due to him on his Accounts shall be paid.—A receiver will not be discharged until he shall have received from the parties interested in the estate the balance that shall be found due to him on passing his accounts.(x)

Receiver not discharged on Application of one Party only.—A receiver being appointed for the benefit of all the parties interested, he will not be discharged merely on the application of the party at whose instance he was appointed ;(y) nor where a receiver has been appointed on behalf of infant tenants in common will he be discharged as to the share of one of them who has attained twenty-one.(z)

Mode of Application to discharge a Receiver.—The application to discharge a receiver may be made by petition, motion, or summons,(a) or the direction for the discharge of a receiver may be given in the decree at the hearing, or in the order upon further considerations.(b)

Application must be served on Parties.—The petition, or summons, or notice of motion should be served on

(x) *Bertand v. Davies*, 31 Beav. 436, *infra*.

(y) *Davies v. Duke of Marlborough*, 2 Sw. 118; *Bainbrigge v. Blair*, 3 Beav. 421, 423.

(z) *Smyth v. Lyster*, 4 Beav. 227, 229.

(a) Set. on Decr. 1023; see, as to forms of petition, notice of motion, and summons, 3 Dan. Ch. Pr. 1774, 1775.

(b) Set. on Decr. 1023.

all the parties.^(c)¹ The service should be personally on the receiver, and such service will not be dispensed with, unless an order for substituted service be obtained.^(d) But a receiver though served is not entitled to appear at the hearing of the application. If he appear, he will not be allowed the costs of the application.^(e)

Form of Order on discharging Receiver.—If the receiver has not passed his final account and paid over the balance found due from him, the order directs him so to do; and if he has given a recognizance, it directs the recognizance to be vacated on his passing his final accounts and paying the balance found due from him, if that has not already been done.^(f) An office copy of the recognizance, if any, must be procured from the Enrolment Office, and left at the time of bespeaking the order.^(g)

Vacating Recognizance.—When a recognizance is directed to be vacated, the order must be taken,

(c) Dan. Ch. Pr. 1601.

(d) *Att.-Gen. v. Huberdashers' Company*, 2 Jur. 915.

(e) *Herman v. Dunbar*, 23 Beav. 312.

(f) Set. on Decr. 1021, 1022. Dan. Ch. Pr. 1602. By consent of all parties an application to

vacate a receiver's recognizance may be made by petition of course. Dan. Ch. Pr. 1601, n.; see as to form of summons to vacate recognizance, 3 Dan. Ch.

Pr. 1776.

(g) Reg. 15th March, 1860; r. 36; Dan. Ch. Pr. 1602.

¹ A receiver is not freed by his discharge from liability to a party who had no notice of the motion for discharge. *Miller v. Loeb*, 64 Barb. 454.

together with an office copy of the Chief Clerk's certificate, and the Accountant General's certificate of payment of the balance into court, or an office copy of the affidavit of payment of the balance to the person entitled to it, where the order directs such payment to the Secretary of the Master of the Rolls, who, if the evidence of payment is satisfactory, makes a note of it, and marks the order with his initials. The order must then be taken to the Enrolment Office, and the recognizance will be marked as vacated.^(h)

Receiver who has been discharged, not paying in his Balance, disallowed Salary and charged Interest.—A receiver who has been discharged and does not pay in his balance as directed, is subject to the order of 1796, and the order which is founded on it, and will be ordered to pay in the balance, with the amount of his salary, and interest at five per cent. on both sums, from the day first appointed, as well as the costs of the motion.⁽ⁱ⁾

Deposit of Receivership Book.—Where a receivership has been completed, the book containing the accounts is to be deposited in the Clerk of Records and Writs Office.^(k)

^(h) Dan. Ch. Pr. 1602; Smith Ch. Pr. 1039.

⁽ⁱ⁾ *Harrison v. Boydell*, 6 Sim. 211.

^(k) Ord. XXIV. 4.

CHAPTER XII.

LIABILITIES AND RIGHTS OF SURETIES.

Where Sureties discharged at their own Request.—The sureties for a receiver will not be discharged at their own request. Where, therefore, an application was made to discharge a receiver on the ground of misconduct, and the sureties joined in the application, Lord Hardwicke held that no regard was to be had to their application unless it was for the benefit of the estate, or unless there be special circumstances in the case, (a) as, for instance, where underhand practice can be proved, and the person secured can be shown to have been connected with such practice. (b) In *Swain v. Smith*, (c) a surety was discharged on his own application, where he had become such in violation of partnership articles.

On Discharge of Surety fresh Recognizance is necessary.—Where a surety procures his discharge during the continuance of the receivership, the receiver must enter into a fresh recognizance with new sureties. (d)

(a) *Griffith v. Griffith*, 2 Ves. 400; see as to application by a surety for his discharge, *O'Keefe v. Armstrong*, 2 Ir. Ch. 115.

(b) *Hamilton v. Brewster*, 2 Moll. 417.

(c) Set. on Decr. 1021.

(d) See *Vaughan v. Vaughan*, 1 Dick. 90; *Blois v. Betts*, 1b. 336.

Death, &c., of Surety.—Where one of the sureties of a receiver dies leaving real property bound by his recognizance, his decease is no ground for requiring the receiver to procure a new surety. But where it appears that the deceased surety has not left any property which could be made available for the purpose of satisfying the recognizance, the court directed a new surety to be appointed.(e)

Where one of the sureties dies, or goes abroad, and the receiver is unable to procure another surety, it is not the practice to charge the receiver with the expense of his discharge, or the appointment of a new receiver.(f)

When a surety becomes bankrupt, the receiver is usually required to enter into a fresh recognizance with two or more sureties. The order is made on summons.(g)

Order on Discharge of Surety.—In *Shuff' v. Holdaway*, an order was made on the application of the surety, directing the receiver's accounts to that time to be passed, and that on payment by the receiver or by the applicant of the certified balance (not exceeding the penalty) into court, the applicant should be discharged as surety, and be at liberty to apply to have the recognizance vacated as to him; and that the applicant should be at liberty to attend the taking of the ac-

(e) *Averall v. Wade*, Fl. & K. 341.

(g) Dan. Ch. Pr. 1603; see as to form of summons, 3 Ib. 1777.

(f) *Lane v. Townsend*, 2 Ir. Ch. 120.

counts; but he was ordered to pay the costs of the application.(h)¹

Surety allowed to attend passing of Accounts of Bankrupt Receiver.—Where a receiver has become bankrupt, and the sureties are likely to be called upon to pay the balance due from him, liberty will be given to them to attend the passing of the receiver's account;(i) and so where a receiver had died in insolvent circumstances, and his personal representatives had consented to his final account being taken in the suit in which he was appointed, liberty was given him to attend.(k)

Extent of Liability of Surety.—The surety is answerable to the extent of the amount of the recognizance for whatever sum of money, whether principal, interest, or costs, the receiver has become liable, including the costs of his removal, and of the appointment of a new receiver in his place.(l) In a case, however, where a receiver had been bankrupt, with the knowledge of all parties, for a considerable time, during which no steps were taken to compel the passing of his accounts, the surety was excused the payment of interest.(m)

(h) Dan. Ch. Pr. 1603; see also *O'Keefe v. Armstrong*, 2 Ir. Ch. 115.

(i) *Rawson v. Raynes*, 2 Russ. 467; see as to form of summons by surety to attend the passing of a receiver's accounts, 3 Dan. Ch. Pr. 1778.

(k) *Simmons v. Rose*, cit. Dan. Ch. Pr. 1604.

(l) *Maunsell v. Egan*, 3 J. & L. 251; see *Dawson v. Raynes*, 2 Russ. 467; *Re Lockety*, 1 Ph. 509.

(m) *Dawson v. Raynes*, 2 Russ. 466; see *Re Herricks*, 3 Ir. Ch. 187.

¹ See *Williamson v. Wilson*, 1 Bland, 439.

Course for the Surety to pursue when Action is brought against him on the Recognizance.—Where an action is brought against the surety upon the recognizance, the proper course for him to pursue appears to be to apply to the court by motion or summons, with notice to the parties interested in the suit to stay the proceedings on the recognizance, offering at the same time to pay the amount due from the receiver, but not exceeding the penalty of the recognizance, into court.⁽ⁿ⁾ The surety must pay the costs of the application, and of the proceedings in consequence of it.^(o) If the receiver's account has not been taken, the application should also pray an inquiry as to what is due from the receiver. The court may, it would seem, upon an application of this kind, indulge the surety by allowing him to pay the balance in instalments.^(p)

Sureties should not pay the Moneys to the Solicitor of the Plaintiff.—Payment by the surety to the solicitor prosecuting the proceedings is insufficient. In a case where a surety, when sued upon his recognizance, had paid the amount to the solicitor prosecuting the proceedings, and then applied to have his recognizance vacated, and served the petition on the plaintiff who did not appear, the court would not order the recognizance to be vacated, but directed the plaintiff to be served with notice that an order should be made on a

⁽ⁿ⁾ *Walker v. Wild*, 1 Madd. 528; Dan. Ch. Pr. 1604; see as to notice of motion on summons by surety to stay actions on the

recognizance, 3 Dan. Ch. Pr. 1773.

^(o) *Walker v. Wild*, 1 Madd. 628.

^(p) *Ib.*

certain day, that the recognizance should be vacated, unless he should show cause to the contrary.(q)

Surety paying Moneys for Receiver entitled to be indemnified.—If a surety has been called upon to pay anything on account of the receiver, he is entitled to be indemnified for what he has paid for the receiver out of any balance which may be coming to him in the suit. Therefore, where a receiver had borrowed money from his surety to make necessary payments, it was held that the surety was entitled to be repaid the amount lent out of the balance in court, reported due to the receiver.(r) Upon the same principle, the share of a receiver in property which was being administered by the court, was held liable to make good to the surety the amount paid by him for the receiver, although it was not included in a mortgage which the receiver had given the surety as an indemnity.(s)

Right of Surety who has paid the Amount due by the Receiver to enforce Recognizance against his Co-surety.—A surety who pays the debt of his principal has the same right against his co-surety that he has against the principal, and will be permitted to put the recognizance in suit as against the co-surety.(t)

(q) *Mann v. Stennett*, 8 Beav. 189.

(s) *Brandon v. Brandon*, 3 D. & J. 524.

(r) *Glossup v. Harrison*, 3 V. & B. 134; Coop. 61.

(t) *Woods v. Creaghe*, 2 Hog. 51.

CHAPTER XIII.

MANAGERS AND CONSIGNEES.

Manager.—Where a receiver is required for the purpose not only of receiving rents and profits, or of getting in outstanding property, but of carrying on or superintending a trade or business, he is usually called a manager, or a receiver and manager. The appointment of a manager implies that he has power to deal with the property over which he is appointed manager, and to appropriate the proceeds in a proper manner.^(a)

In what Cases appointed.—Where the court appoints a manager of a business or undertaking, it in effect assumes the management into its own hands; for the manager is the servant and officer of the court, and upon any question arising as to the character or details of the management, it is the court must direct and decide. Managers, when appointed by the court, are responsible to the court, and no orders of any of the parties interested, in the business over which they are appointed managers, can interfere with this responsibility. The court will in no case assume the management of a business or undertaking except with a view

^(a) *Sheppard v. Oxenford*, 1 K. & J. 500.

to the winding up and sale of the business or undertaking. The management is an *interim* management; its necessity and its justification spring out of the jurisdiction to liquidate and sell; the business or undertaking is managed and continued in order that it may be sold as a growing concern, and with the sale the management ends.^(b)

A manager may be appointed to carry on a private trade or business so as to wind it up for the benefit of the parties interested. In *Steer v. Steer*,^(c) a manager was appointed to carry on the business of the intestate, there being no existing representative to his estate.^(d)¹

The cases in which managers are generally appointed are partnership cases. The principles on which the court acts in appointing managers in such cases have been already pointed out.^(e)²

Manager of Railway Company.—The court will not appoint a manager of a railway company,^(f)³ for, in

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| (b) L. R. 2 Ch. App. 211, 212 ;
per Lord Cairns, see <i>Waters v. Taylor</i> , 15 Ves. 25 ; <i>supra</i> , p. 90. | (e) <i>Supra</i> , p. 90, <i>et seq.</i> |
| (c) 2 Dr. & Sm. 311. | (f) <i>Gardner v. London, Chatham, and Dover Railway Co.</i> , L. R. 2 Ch. App. 212 ; <i>Bowen v. Brecon Railway Co.</i> , <i>ib.</i> ; 3 Eq. 545 ; <i>Griffin v. Bishop's Castle Railway Co.</i> , 15 W. R. 1058. |
| (d) See as to manager of a newspaper, <i>Chaplin v. Young</i> , 6 L. T. N. S. 97. | |

¹ The court may authorize a receiver to carry on business ; see *Marten v. Van Schaick*, 4 Paige C. R. 479 ; *Crane v. Ford*, Hopkins, C. R. 114 ; *Jackson v. De Forest*, 14 How. Pr. R. 81 ; *Smith v. New York Stage Co.*, 18 Abb. Pr. Rep. 420 ; 28 How. Pr. R. 377.

² See the cases cited in the notes to page 90, *supra*, and also *Weissenborn v. Seighortner*, 6 C. E. Green, 483, where *Seighortner v. Weissenborn*, 5 Id. 177, is overruled.

³ It was said in *Stevens v. Davison*, 18 Grattan, 828, that, while, for the reasons assigned in *Gardiner v. The Railway Co.*, L. R. 2

addition to the general principle that the Court of Chancery will not in any case assume the permanent management of a business or undertaking, there is that peculiarity in the undertaking of a railway which would make it improper for the Court of Chancery to assume the management of it at all. Where the legislature, acting for the public interest, authorizes the construction and maintenance of a railway, both as a highway for the public and as a road on which the company may themselves become carriers of passengers and goods, it confers powers and imposes duties and responsibilities of the largest and most important kind, and it confers and imposes them upon the company which the legislature has before it, and upon no other body of persons. These powers must be executed and these duties discharged by the company. They cannot be delegated or transferred. The company will, of course, act by its servants, for a corporation cannot act otherwise, but the responsibility will be that of the company. The company could not by agreement hand over the management of the railway to the debenture holders. It is impossible to suppose that the Court of Chancery can make itself or its

Ch. App. 201, a Court of Chancery will be reluctant to appoint a receiver to take charge of and manage a railroad, it is competent to do so where such a course is indispensable to secure the rights of the legitimate stockholders and to prevent a failure of justice. Under the circumstances of this case the court deemed the appointment of such a receiver a proper measure. Such an appointment is now frequently made. See *Paige v. Smith*, 99 Mass. 395; *Blumenthal v. Brainerd*, 38 Vermont, 408; *The Delaware, Lackawanna, and Western Railroad Co. v. The Erie Railway Co.*, 6 C. E. Green, 298, and *ante* p. 223, note.

officers, without any parliamentary authority, the hand to execute these powers, and all the more impossible where it is obvious there can be no real and correlative responsibility for the consequences of any imperfect management. It is immaterial that the company do not object to, or may even desire, the appointment of a manager.(g)

Under the provisions, however, of a late act, the Railways Companies' Act, 1867, 30 & 31 Vict., c. 127, s. 4, a creditor who has recovered judgment against a railway company may obtain, if necessary, the appointment of a manager of the undertaking.(h)

Manager of Market, &c.—Though a receiver may be appointed of the tolls of a market, the court will not appoint a manager of a market or of the affairs of a corporation.(i)¹

Manager of Property abroad.—Where the suit relates to property abroad or in the colonies, which partakes of the nature of a trade, it is competent for the court to appoint a manager.² The manager is appointed in such cases, not for the purpose of carrying on the trade, but to enable the court to give relief when the cause shall be heard.(k) Persons, for instance, have been

(g) L. R. 2 Ch. App. 212, 213,
per Lord Cairns.

(h) *Supra*, p. 76; see *Re Stafford and Uttoxeter Railway Co.*, 3 W. N. 113.

(i) *De Winton v. Mayor, &c., of Brecon*, 26 Beav. 542.

(k) *Waters v. Taylor*, 15 Ves. 25; per Lord Eldon; *Sheppard v. Oxenford*, 1 K. & J. 500.

¹ See *Neall v. Hill*, 16 Cal. 150.

² See *Daniel's Chan. Prac.* 1449, 3d Am. ed.

appointed to manage landed property, to receive the rents and profits, and convert, get in, and remit the proceeds of property and assets, when such property has been situated in India,(l) the West Indies,(m) Demerara,(n) and the Brazils.(o)

A person resident in England may be appointed manager, with authority to appoint an agent abroad in the country where the property is situated;(p) and sometimes a person resident in the country where the estate is situated is appointed manager.(q)

Consignee.—In cases where the manager of the estate must necessarily reside in the country where the estate is situated, it is usual to add, to the order directing the appointment of a manager, an order for appointment of one or more consignee or consignees resident in this country, to whom the produce of the property in question may be remitted, and by whom it may be disposed of.(r)

A consignee acting under the appointment of the court is the paid agent of the court to manage the estate which is in the hands of the court.(s)

Mode of Appointments.—The course of proceeding

(l) *Logan v. Princess of Coorg*, K. & J. 500; see as to form of order, *Ib.* 501; Set. on Decr. 1038.

(m) Set. on Decr. 1036, 1037; 1034.
see *Barkley v. Lord Reay*, 2 Ha. (p) Set. on Decr. 1036-1039.
308. (q) *Ib.*

(n) *Bunbury v. Bunbury*, 1 (r) Set. on Decr. 1035, 1036,
Beav. 336; *Bentinck v. Willink*, 1037.

1 L. T. 410. (s) *Morrison v. Morrison*, 7

(o) *Sheppard v. Oxenford*, 1 D. M. & G. 226.

under an order for the appointment of a manager and consignee is the same as that under an order for the appointment of a receiver,^(t) and the general orders of the court which apply to receivers apply to managers and consignees also.^(u)

Security in general must be given.—In some cases a manager of a West India estate has been appointed without giving any security whatever;^(x) but in *Rutherford v. Wilkinson*,^(y) Lord Gifford, M.R., said it had been only done under special circumstances, and that in general, to warrant such a course, it should appear that no manager could be found who would give security, or that the person proposed was fit to be appointed without security. Under the circumstances, however, he made the order for the appointment without security, with the consent of such of the parties as could consent, but on a subsequent application in the same cause security was required.^(z)

A manager or consignee in England, unless he is the trustee or other legal personal representative of the property, is required to give the usual security to account for what he may receive;^(a) and ordinarily the person appointed to act abroad as manager must give the like security of persons resident in this country.^(b)

The manager of a West India estate is not required to give security faithfully to manage. Having a dis-

(t) Dan. Ch. Pr. 1605.

(u) Prel. Ord. X., r. 10.

(x) Set. on Decr. 1038.

(y) Ib. 1036, 1038.

(z) Ib.

(a) Ord. XXIV. 1.

(b) Ib. *Cockburn, v. Raphael*,

2 Sim. & St. 453.

cretion given him to expend moneys on the estate, he is only required to give security to account for what he shall receive, and to consign so far as the due management of the estate permits.(c) In a case where a testator had directed that a particular person should be appointed *receiver* of his estate, and was possessed of no real estate except an estate in the West Indies, the party named was appointed manager and consignee upon entering into a personal recognizance to account for the produce.(d)

Executor or Trustee may be appointed Consignee.—
An executor or trustee may be appointed consignee.(e) The appointment of a defendant who is an executor or trustee to be a consignee with the usual profits is a matter for the discretion of the court; but, when such a discretion has been exercised, and an appointment made under it has been acted on, the court will not afterwards withdraw its sanction from the appointment.(f)

Consignee not answerable for the Orders of the Court.—
A consignee appointed by the court, like any other servant or agent of the court, not affected with fraud or improper conduct, is not answerable for the wisdom, correctness, or propriety of the orders which he re-

(c) *Morris v. Elme*, 1 Ves Jr. 139.

(d) *Hibbert v. Hilbert*, Mer. 681.

(e) *Marshall v. Holloway*, 2 Sw. 432.

(f) *Morrison v. Morrison*, 4 M. & C. 216.

ceives, or for the directions by which his acts are sanctioned.(g)

Consignees have a Charge on the Property for payments authorized by the Court.—Consignees appointed by the court in an administration suit have a charge on the property for payments sanctioned by the court in priority to incumbrances created before the suit, and will be allowed interest on the balance due to them.(h) *In Re Tharp*,(i) Lord St. Leonards allowed a consignee appointed by the court to be reimbursed from English estates of the same owners, though not a receiver of the rents.

Manager appointed in the Event of the Death of the Present Manager.—The court, in dealing with property in a colony, may provide against the inconveniences likely to arise from the death, absence, or incapacity of the manager in existence, or appointed by the court, by appointing another manager to act in such event.(k)

In *Forbes v. Hammond*,(l) a reference was granted to approve of a proper person to succeed the consignee of a West India estate in the event of his death, he being in a dangerous state of health, but this was done unwillingly, because the person chosen might cease to be a proper person before the commencement

(g) *Morrison v. Morrison*, 7 D. M. & G. 223. (i) 2 Sm. & G. 578.

(h) *Ib.* 2 Sm. & G. 564; 7 D. M. & G. 214. (k) *Rutherford v. Wilkinson*, Set. on Decr. 1036.

(l) 1 J. & W. 88.

of his office. The order seems to have been made only on the consideration that the question must again come before the court on the report.

Manager not entitled to Crops severed before his Appointment.—A receiver or manager of a West India estate who has been appointed at the instance of a mortgagee is not entitled to the produce of crops severed and shipped to the consignee of the mortgagor prior to his appointment as receiver and manager, although they had not, at the time of the order, been received by the consignee.(*m*)

Commission of Manager; Allowances.—The manager of a West India estate is entitled to a commission so long as he is resident in the island or colony, and is personally acting in the management of the estate.(*n*) The commission is the reward of his personal care and attention.(*o*) If he is absent from the island or colony, he is not entitled to the commission himself, but he may be allowed such sums as he has really paid to others for the management of the estate during his absence, provided such payments be in themselves reasonable.(*p*)

Manager or Consignee will not be discharged until the Amount due to them has been paid.—Where the court

(*m*) *Codrington v. Johnstone*,
1 Beav. 520.

(*o*) *Chambers v. Goldwin*, 9
Ves. 273.

(*n*) *Forrest v. Elwes*, 2 Mer.
69.

(*p*) *Forrest v. Elwes*, 2 Mer.
69.

has taken possession of an estate by a manager or consignee, it will, as against all parties for whose benefit the possession has been held, refuse to permit its officers to be discharged until the amount due to them has been paid.(q) A manager is entitled to his ordinary commission and allowance, and also to a lien on the estate, as against all persons interested in it, for the balance, whatever it may be, that shall be found due to him on taking his accounts.(r)

Where a balance is found due to a consignee on a final settlement of accounts, he cannot be discharged until that balance is paid, and, if payment cannot be made without interfering with the inheritance or *corpus* of the estate, the court would be justified in resorting to it for the purpose of doing justice to the consignee.(s) But the case is different where, pending the consigneeship, an order is sought by a consignee that the balance found due to him should be paid out of the *corpus*. A consignee cannot, during the continuance of his office, come to the court from time to time, as often as there is a balance in his favor, and ask for payment out of the *corpus* of the estate.(t)

(q) *Fraser v. Burgess*, 13 Moo. P. C. 246.

(r) *Bertrand v. Davies*, 31 Beav. 436.

(s) *Parquharson v. Balfour*, 8 Sim. 213.

(t) *Ib.*; see, as to cases in

which the question was whether consignees of West India estates were entitled to be reimbursed out of moneys which had been awarded under the Act for the Abolition of Slavery, *Ib.*; *Shaw v. Simpson*, 1 Y. & C. C. C. 732.

APPENDIX OF FORMS.

[The usual form of *prayers* for Receivers is, simply, that “a receiver be appointed to (here set out the purpose of his appointment, whether to take charge of the estate of a decedent, or the assets of a firm, or the property of a corporation, or otherwise, as the case may be), with such power and authority therein as to this Court may seem meet, and as the justice of this cause may require.” If, in any case, it is desirable that certain powers should be specifically prayed for (which will seldom occur), frame such prayers by setting out therein the powers desired to be conferred, for which see forms hereinafter given.]

I.

Order Appointing a Receiver of a Railroad Company.

In the Court of the United States for the

Between

a citizen of the State of

and the N. O. and C. Railroad Company, complainants,
and The S. Railroad Association, defendants, respectively
bodies corporate as particularly stated in the
Bill filed.

And now,

upon filing the Bill in the above-entitled suit and on
motion of

solicitor for the plaintiff therein, it is ordered and
decreed as follows:

sistent with any requirement of law relating to the said business.

II. To keep the said railroad and branches, boats, or vessels, rolling stock, and all the property of the said Company, real and personal, in good condition and repair, so that the said railroad may be safely and efficiently operated; and to the same end he may make such additions, by purchase or lease, to the equipment of the said railroads as may be hereafter required to keep up the transportation facilities thereon to a proper state of capacity and efficiency.

III. To employ, pay, and when necessary discharge all agents and employees required to enable him to discharge his duties as Receiver, and to purchase and pay for all necessary material and supplies. And, further, to pay all wages and salaries due by the N. O. and C. Railroad Company for services rendered during the months preceding the date of the said Receiver entering upon the duties of his office.

IV. To pay all lawful taxes and other charges and assessments upon any and all the said property, real or personal. And generally to make from the income of the said railroad all such other payments as may be necessary or incident to the possession, control, and operation of the said railroad in accordance with this order.

V. To prosecute or defend without the further order of this Court all existing actions by or against said Company or either of the companies consolidated into it, and to pay and defray the expenses properly inci-

dent thereto; to commence and prosecute any actions which in the course of business he may deem necessary or proper to commence hereafter, either in the name of the said company, or in his own name, as such Receiver, as he may be advised, and to defend all suits that may hereafter be brought against the said companies or any of them, and to defray the reasonable and proper expenses thereof, and to pay the fees of counsel with whom he may consult in the discharge of his duties as Receiver, and also to pay all reasonable fees and legal expenses incurred by the parties to the present suit up to the date of his appointment.

VI. To protect and preserve the franchises of the said Company, and to do whatever may be needful and lawful for that purpose and for maintaining the *ad interim* corporate organization of the said Company, and to defray the necessary and proper expenses thereof: and in all and singular the premises the said Receiver shall be subject to such orders and directions as this Court may from time to time make in the premises, and for which the said Receiver may apply as he shall be advised. The said Receiver shall keep full, particular, and accurate accounts of all the earnings, revenue, and income of the said railroad, and of all expenditures made by him in performance of the duties of his said office, and shall preserve vouchers therefor; and he shall once in every months, and oftener if required, file with the Clerk of this Court a true and particular account of all such receipts and disbursements.

He shall keep all money received by him on deposit in one or more banks of good credit, subject to his order and to be drawn therefrom on his check only for the proper purposes of the said receivership, and all sums not required for making such payments shall be safely kept subject to the further order of this Court.

The said Receiver shall be paid, so long as he shall faithfully discharge his duty, at the rate of thousand dollars per annum in full for all services.

And it is hereby further ordered that the said N. O. and C. Railroad Company and all the officers and agents thereof shall deliver up and render to the said Receiver, upon his qualification as aforesaid, all and singular the premises whereof he is appointed receiver as aforesaid.

And it is finally ordered that before the said Receiver shall enter upon the duties of his office he shall file a bond, with two or more sureties, to be approved by this Court or one of the Judges thereof, conditioned for the faithful performance of his duties as such Receiver.

II.

*Order Appointing Receiver of Railroad Company in a
Foreclosure Suit.*

It is ordered by the Court :

First.—That C. L. P., of New York, and H. F., of Lynchburg, Va., be and they are hereby appointed joint receivers of all and singular the mortgaged premises specified and described in the deed of trust referred to in the plaintiff's bill of complaint, including the entire line of railroad therein mentioned; all and singular the franchises, lands, tenements and hereditaments of the said defendant company; all and singular the books, papers, and records thereof; all and singular the rolling stock, tools, machinery, engines, and all the personal property of every kind and description of the said company.

Second.—That the said receivers, before entering upon the performance of their duties as such under this order, do each of them severally execute a bond, with sureties, to be approved as to form and sufficiency by a judge of this Court, and filed with the clerk thereof, in the sum of \$100,000, for the faithful discharge of his duties in the premises.

Third.—That upon filing of such bonds the said receivers proceed to take possession of all and singular the premises whereof they are hereby appointed receivers; that they continue to run and operate the said railroad of the defendant as the same is now operated for the common carriage of freight and passen-

gers, keeping the premises and property both real and personal in good condition and repair, to the end that said road may be operated efficiently and with safety to the public; that they as such receivers have authority to employ, pay and discharge from time to time, in their discretion, all needful laborers, servants, agents, attorneys and counsel; to purchase and pay for all needful materials and supplies; to settle and adjust with other roads all traffic balances in the usual course of business; to make from time to time, in their best discretion, all needful and proper traffic arrangements with other roads for the interchange of business; to pay all taxes on the property whereof they are appointed receivers that may be due and payable or become due and payable during their receivership; to prosecute and defend without the further order of this Court all existing actions by or against said company; and to defend all actions that may hereafter be brought against the said company or against themselves as such receivers, by the permission of this Court, and to pay the expenses of such prosecution and defence, and also the expenses and disbursements of the plaintiffs, trustees in and about the appointment of said receivers; to use the name of said company in the prosecution of all such actions as they may find it proper and necessary, in their discretion, to bring, maintain or defend, with full power to compromise, adjust and settle, in their best discretion, all such actions, suits or controversies now existing or that may hereafter arise; to do whatever may be needful and proper to maintain and preserve the corporate organization and franchises of the com-

Fourth.—It is further ordered that as soon as may be after the said receivers have entered upon the performance of their duty, they make a true, full and perfect inventory of all and singular the real and personal property of every kind and description whereof they are appointed receivers and which may come into their possession, and file the same with the clerk of this Court, and due notice of such filing to be given to the plaintiff's solicitors. That the said receivers do keep full, true and accurate accounts of all and singular their acts and doings in the premises; that they render and file with the clerk of the Circuit Court of the United States for

District of

such account within ten days after the expiration of every month of their receivership, and serve copies thereof upon the plaintiff's solicitors, and that they have liberty to pass their accounts from time to time before M. F., who is hereby appointed a master for that purpose, on ten days' notice to the plaintiff's solicitors after the service on them of such copy thereof; that any questions which may arise on such accounting be reported to this court for examination and decision, and that such accounting, when from time to time had and completed, shall be final

and conclusive upon all parties, unless on due cause shown the same shall, during the pendency of this action, be opened on special application.

Fifth.—It is further ordered that all moneys coming into the hands of said receivers or either of them be by them deposited in one or more safe banks of deposit, to be approved by this Court or a judge thereof, to the joint credit of the receivers, to be by them drawn out on their joint order or on the order of an agent or attorney to be by them agreed upon. It is further ordered that the said receivers, exercising due prudence and caution in the selection thereof, shall not be responsible for the wrongful acts of their servants and agents. It is further ordered, that the said receivers shall not, nor shall either of them, in any case incur any personal or individual liability in the operation of the said line of railroad or otherwise in the premises by reason of any act or thing done by them or either of them as receivers, or by their servants, agents or attorneys, the said receivers respectively acting in good faith and in the exercise of their best discretion; but the mortgaged premises shall nevertheless be chargeable with any judgment which may be established against the receivers in any action brought against them by any person under leave of this Court first had and obtained. It is further ordered that the said receivers respectively shall in no case be responsible for the acts of each other, but shall be responsible only severally each for his own acts.

Sixth.—It is further ordered that all applications

for interlocutory order or relief in this action, by or on behalf of any party thereto or the receivers therein, shall be made on notice by the moving party to the party or parties of at least ten days exclusive of the day of service, and on due proof of personal service of notice, unless the notice hereby required be waived in writing.

Seventh.—It is further ordered that the said defendants and all persons whatsoever be and they are hereby strictly commanded and enjoined peacefully to deliver up and surrender to the said receivers all and singular the premises whereof they are hereby appointed receivers, under the penalty attaching by law to disobedience. And in the mean time, and until the actual taking possession of the said property by the said receivers, it is ordered that the said A., M., and O. Railroad Company, its president, officers, agents and attorneys, be and they are hereby enjoined and restrained from disposing of or parting with any of the said property, real or personal, except in the payment of the necessary daily expenses of said road, and that the said company forthwith deposit all moneys and available balances now in its possession or control and which comes into its possession from day to day, except what is needed for the said necessary expenses, in the A. National Bank of N., subject to the order of this Court in this cause.

III.

Receiver of Real and Personal Estate of Decedent.

It is ordered and decreed, that A. B. be appointed receiver, upon his giving security, of the rents and profits of the real estates (freehold and leasehold), and to collect and get in the outstanding personal estate of C. D., the testator (or intestate) in the pleadings mentioned. And the tenants of the said real estate are to attorn and pay their rents in arrear and growing rents to such receiver. And it is further ordered that E. and F., the executors of the will of the testator (or the administrators of the effects of the intestate), deliver over to such receiver all securities in their hands for such outstanding personal estate, together with all books and papers relating thereto. And it is further ordered that the receiver from time to time do pass his accounts, and pay the balances which shall be certified to be due from him, into the bank of Z. to the credit of this cause (or into the Registry of the court to the credit of this cause).

IV.

*Order Appointing Party to a Cause Receiver to Act
Without Salary or Security.*

It is ordered that A. B. be at liberty to propose himself as such receiver without giving security, he undertaking to act without salary in case he shall be appointed.

V.

*Order Requiring Tenant to Attorn and Pay Rent
and Arrears.*

Upon consideration of the orders heretofore made in this cause, whereby it appears that A. B. has been duly appointed receiver of etc.; and an affidavit of the said A. B. and of C. D., filed of personal service of the said order, and of notice in writing signed by the said A. B. and E. F., requiring the said E. F. to attorn to him as such receiver, for the [*describe the property*] occupied by the said E. F., situate at being part of the said estates, and to pay his rent in arrear and growing rent for the same to the said receiver; and of the said E. F.'s refusal [or neglect] to attorn to and become the tenant of the said receiver, or to pay any rent to him, and an affidavit of G. filed of notice of this motion to the said E. F.; let the said E. F., within eight days after service of the order, attorn to and become the tenant of the said A. B., the receiver appointed in this cause in respect of the etc., occupied by the said E. F., situate at part of the estate etc.

VI.

Receiver to Distrain.

Let C., the receiver of the rents and profits of the estates of etc., be at liberty to distrain upon the goods and chattels of the several tenants named in the said affidavit, for the several amounts of rent due and

owing from the said tenants; and let such distrainments be made in the name of the defendant A., in whom the legal estate in the said etc. is vested.

VII.

Receiver to Bring Action for Rent, and Tenants to Attorn.

Let etc., the receiver of the rents and profits of the charity lands in etc., be at liberty, in the names of the defendants, to bring actions in the [proper court], against the several persons named in his said affidavit, for recovery of the arrears of rent due from them respectively to the said charity; and let R. etc., in the said affidavit named, who are respectively in possession of part of the said estates respectively [*If on notice, on or before etc., or within etc.*], attorn as tenants to the said receiver.

VIII.

Inquiry as to Cutting Timber, with Consequent Directions.

Let an inquiry be made, whether there are any and what timber or other trees standing or growing on the estates etc., which are fit to be cut down; and let such timber and other trees as shall appear to be fit to be cut down, be cut down and sold with the approbation of the judge; and let a proper person, upon his giving security, be appointed to receive the proceeds of such sale; and be at liberty to pay and retain thereout such

costs, charges, and expenses of surveying, valuing and selling such timber and other trees as the judge shall allow; and let such persons within (14 days) after the date of the chief clerk's certificate, or such other time as shall be thereby appointed, pay the residue of the proceeds of such sale into the bank, to the credit of this cause [*If so, to an account to be entitled etc.*], subject etc.

IX.

Receiver to Cut and Sell Timber.

Let W., the receiver appointed in this cause, be at liberty to cut down the timber and other trees mentioned in the affidavit of etc., filed, etc., and to sell the same, and include the proceeds thereof in his accounts as such receiver; and let the said receiver pay and retain out of such proceeds the costs, charges, and expenses of the applicants properly incurred of this application, and of cutting down and selling the said timber and other trees, such costs, charges and expenses to be ascertained by the chief clerk to the judge and allowed the receiver in his accounts.

X.

Receiver and Manager of Testator's Mines and Realty.

Let a proper person be appointed to manage, carry on, and work the mines devised by the will of H., the testator in the pleadings named, and to raise, get, and dispose of the coal, iron-stone, quarry-stone, and other

minerals from the said mines, and to receive the produce of such sales, and the rents and profits of the said mines, and pay and discharge the current expenses and charges of working the same, and to receive the rents and profits of the lands (and hereditaments) in or under which the said mines are now lying or being, and to collect and get in the outstanding debts belonging to the said business. And the tenants of the said lands are to attorn etc.; and let defendants etc. deliver up the possession of the said mines to such manager and receiver as form etc.; and also all securities in their hands in respect of such outstanding debts, and the stock, goods, effects, and accounts belonging to the said mining business. [Direction to pass accounts and pay in balances.]

XI.

Receiver and Manager of Testator's Business.

Let a proper person be appointed to collect, get in, and receive the debts now due and outstanding, belonging to the trade or business in the pleadings mentioned, carried on by the testator, and since by the defendants M. and C. and by the defendant M., and, out of the first moneys to be received, to pay the debts due from the said trade or business, and to manage the same until the sale thereof; and let the plaintiffs and defendants deliver over to such person all the stock in trade, goods, effects, books, and accounts belonging to the said business. [Direction to pass accounts and pay in balances.]

XII.

Receiver of Leasehold and Partnership.

Let a proper person be appointed to receive the rents and profits of the leasehold hereditaments in the pleadings mentioned (other than the house in which the defendant resides), and also to receive and get in the debts and effects of the partnership in the pleadings mentioned; tenants to attorn; plaintiffs and defendant to deliver to receiver all partnership effects and securities in their hands for outstanding partnership estates, and books and papers relating thereto; out of the money to be received in respect of the rents, debts and effects, receiver to pay the ground-rents, and debts due and to become due from the partnership, and to pass accounts and pay in balances.

XIII.

Receiver and Manager of Partnership Business.

Let a proper person or persons be appointed, either jointly or separately, to collect, get in, and receive the debts now due and outstanding, and other assets, property, or effects belonging to the said partnership business of etc. at etc., and out of the first moneys to be received to pay the debts due from the said business, and to manage the same so far as relates to any contract subsisting on the day of and either of the parties is to be at liberty to propose himself as such receiver and manager, to act without salary. And let the plaintiff and defendant deliver

over to the person or persons so appointed, all the stock in trade and effects of the said partnership, and also all securities in their or either of their hands, for such outstanding partnership estate, together with all books and papers relating thereto. [Direction that all the partnership property and effects, other than stock in trade and the good will of the partnership, be sold, either as a going concern or otherwise as the judge shall direct, and either of the parties not having the conduct of such sale to be at liberty to bid. Liberty to apply in chambers as to the payment of any liabilities of the partnership prior to the appointment of such receiver and manager or receivers and managers.]

XIV.

Manager and Receiver of Partnership Colliery.

And let a proper person be appointed to take and have the management of the partnership colliery, stock, and effects in the mean time, and until a sale thereof as aforesaid, and to have the direction and superintendence of the work of the said partnership business, and to collect and get in the outstanding debts and effects belonging to the said partnership, and any of the defendants are to be at liberty to propose themselves as such manager and receiver. And let the plaintiff and defendant deliver over to such manager and receiver all securities in their hands for such outstanding partnership debts and effects, together with all the stock, goods, effects, books, and accounts

belonging to the said partnership. And in case it shall be necessary to put any of the debts in suit for the recovery thereof, the same is to be done with the approbation of the judge. And the person so to be appointed is to be at liberty to make use of the names of the said plaintiff and defendants, who are to be indemnified therein out of the stock, goods, and effects of the said partnership, and out of the money to be received in respect of the said debts, by such manager and receiver. And let him pay the debts due and to accrue due from the said partnership and from time to time pass his accounts, and after retaining in his hands such sums as shall be deemed sufficient for carrying on the said colliery, pay the balances that shall from time to time be certified to be due from him into the bank, etc.

XV.

Receiver to Repair Hereditaments.

Let the receiver appointed etc. be at liberty to expend a sum not exceeding dollars in the repair of the hereditaments at etc., part of the estates in question in this cause, such repairs to be done according to the specification and plan marked A. in the affidavit of M. (surveyor) referred to, and to the satisfaction of the said M., and the said receiver is to be allowed what he shall so expend in passing his accounts.

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